Supreme Court of the United States.

OCTOBER TERM, 1894.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY,
Plaintiff in Error,

vs.

WALTER A. CUNNINGHAM,
Defendant in Error.

SAME,
Plaintiff in Error,

vs.

HUGH FINAN,
Defendant in Error.

MICHAEL DONAHUE,
Plaintiff in Error,

vs.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF IN REPLY FOR LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY.

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Brief in Reply for Lake Superior Ship Canal, Railway and Iron Company.

I.

Introduction.

The argument on the other side *(Mr. Dickinson's brief*, p. 56 *et seq.)* rests upon the fundamental proposition that the certification of May 22, 1871, by the Secretary of the Interior of the lands in question in these three cases (Record, pp. 44, 45), is not simply voidable, but utterly void, because such certification was beyond his jurisdiction. This objection was anticipated in the two briefs filed on the part of the Canal Company, and is discussed therein with some fulness. But as the case of the defendants is made to rest wholly upon that proposition, and as the question is one of moment, not only in these cases but generally, and as the decisions of this Court bearing upon it, though entirely consistent and sound, seem to be misapprehended by the learned counsel on the other side, this argument in reply is justified, if not necessary. Let us, therefore, go beyond the surface and make a critical examination :

1st. Of the statutes of Congress that relate to it ;

2d. Of the facts and documents concerning the cases at the bar, as shown by the record ; and

3d. Of the decisions of this Court bearing upon the questions of law arising out of these statutes and facts and documents.

Some additional considerations in reply to the argument on the other side will also be made concerning the true construction and effect of the CONFIRMATORY

ACT OF MARCH 2, 1889, and especially as to its application to the three several defendants—showing that it confirms the plaintiff's title, and that the defendants are not within it, and, therefore, are mere trespassers and intruders, and, as such, cannot question the validity of the conveyance by the United States to the State of Michigan and by the latter to the old Canal Company under whom the present Canal Company through mesne conveyances derives title.

II.

Statutes showing the jurisdiction of the Secretary of the Interior to act upon and determine the question what lands shall be approved to fill the Canal Grant of July 3, 1866, and showing that the certification of the lands in controversy under that grant by the Interior Department to the State for the benefit of the old Canal Company, was the exercise of powers which had, by the legislation of Congress general and special applicable thereto, been committed to that department, and hence that such certification was not void, and had the effect to pass the title to the State for the benefit of the canal company.

REVISED STATUTES OF THE UNITED STATES.

"SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the

following subjects. * * * 2d. The public lands including mines."

"SEC. 446. There shall be in the Department of the Interior a Commissioner of the General Land Office."

"SEC. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to surveying and sale of the public lands of the United States, or in any wise respecting such public lands and the issuing of patents for all grants of lands under the authority of the government."

CANAL GRANT OF MARCH 3, 1865.

Section 2 is as follows:

SEC. 2. *And be it further enacted*, that there be, and hereby is, granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing a harbor and ship canal to connect the waters of Lake Superior with the waters of Portage Lake, *two hundred thousand acres of public lands, to be selected in subdivisions agreeably to the United States survey, by an agent or agents appointed by the Governor of said State*, SUBJECT TO THE APPROVAL OF THE SECRETARY OF THE INTERIOR, *from any lands in the Upper Peninsula of said State, subject to private entry. Provided*, that said selections shall be made from alternate and odd-numbered sections of land nearest the location of said canal in said Upper Peninsula, not otherwise appropriated, and not from lands designated by the United States as "mineral" before the passage of this act, nor from lands to which the rights of pre-emption or homestead have attached.

[*The full text of this act is reprinted in our main brief, p. 3*].

THE ADDITIONAL CANAL GRANT OF JULY 3, 1866, ENACTS:

That there be, and hereby is, granted to the State of Michigan to aid in the building of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in addition to a former grant for that purpose, approved March the 3d, 1865, two hundred thousand acres of land in the Upper Peninsula of the State of Michigan, and from land to which the right of homestead or pre-emption has not attached: *Provided*,

That one hundred and fifty thousand acres of said lands shall be *selected* from alternate odd-numbered sections, and fifty thousand acres from even-numbered sections of the lands of the United States. Said grant of lands shall inure to the use and benefit of the Portage Lake and Lake Superior Ship Canal Company, in accordance with an Act of the Legislature of the State of Michigan conferring the land granted to the said State, by the act herein referred to, on said company:

[*The full text of this Act is reprinted in our main brief at pp. 7, 8.*]

OBSERVE that the lands were to be "selected" by agents appointed by the Govenor of the State of Michigan, subject to the *approval of the Secretary of the Interior*, from any lands of the United States in the Upper Peninsula. The necessary logical and legal effect is that any "approval of the lists by the Secretary of the Interior" implies that he is clothed with the power to act upon the question whether the lands "selected" are of the class of lands subject to selection.

THE RAILROAD GRANT BY CONGRESS TO MICHIGAN OF JUNE 3, 1856, after making the grant, enacts:

"but in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to select, *subject to the approval of the Secretary of the Interior, from the lands of the United States* nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid."

[*The full text of this act is reprinted in our main brief, page 17, note.*]

THE JOINT RESOLUTION OF CONGRESS, OF JULY 5, 1862.

Sections 3, 4 and 5 are as follows :

SEC 3. **And be it further resolved, that the SECRETARY OF THE INTERIOR be, and he is hereby, authorized to cause all EVEN sections or parts of even sections of public lands that may be brought within six miles of the new line of railroad, as herein provided for, to be sold** at the same price and in the same manner those have or might have been according to the said Act of June third, eighteen hundred and fifty-six, upon the originally located route of railroad. And all purchasers, or their heirs or assigns, within the six miles limits of said originally located route [*i. e.* " from Marquette *to the Wisconsin State line.*" See Section 1 of said Joint Resolution, where this description twice occurs], who shall be more than six miles from the new line of route hereby authorized, and who have paid the sum of two dollars and fifty cents an acre, shall have the right either to exchange their locations upon the line, as first established, to the new line upon the same terms, in like quantities, and in the same manner, as on the line first established, as aforesaid, or, at their option, to enter, without further payment, anywhere within the Marquette Land District in the State of Michigan, or that of the Grand Traverse Land District in said State, lying north or west of Lake Michigan, an additional quantity of public lands, subject to private entry, at one dollars and twenty-five cents an acre, equal to the quantity entered by them at two dollars and fifty cents per acre, so that the lands originally entered by them shall be thus reduced to the rate of one dollar and twenty-five cents an acre.

SEC. 4. *And be it further resolved*, that the EVEN sections of public lands reserved to the United States by the aforesaid Act of June third, eighteen hundred and fifty-six, along the originally located route of the Marquette and Wisconsin State Line Railroad Company, [*i.e.* " from Marquette *to the Wisconsin State line*"], except where such sections shall fall within six miles of the new line of road so as aforesaid proposed to be located, and along which no railroad has been constructed, *shall hereafter be subject to sale at one dollar and twenty-five cents per acre.*

SEC. 5. *And be it further resolved*, that upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the land as aforesaid, set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in any wise encumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land, selected in like manner, upon the new line of road as thus surrendered upon the first line, and to the extent of six sections per mile, in the aggregate, for every mile of the new line, according to the general provisions of the Act of June third, eighteen hundred and fifty-six. **And it shall be the duty of the Commissioner of the General Land Office to re-offer for public sale, in the usual manner, the lands embraced in the lists of surrendered lands aforesaid, when duly filed in his office as herein directed.**

[*The full text of this joint resolution is reprinted in our main brief at pp. 30-32.*]

OBSERVE that Sections 3 and 4 confer express jurisdiction on the Secretary of the Interior to determine what even sections are brought within six miles of the new line of road and what are not, and to administer the new grant, and to adjust the rights of purchasers along the old line, as therein provided, and it is provided that the lands along the old line "shall hereafter be subject to sale at one dollar and twenty-five cents per acre"—thereby making them indisputably public lands.

OBSERVE that by Section 5 the Secretary of the Interior is given express power, upon the filing of the lists of the railroad lands in whole or in part as now selected and certified in the General Land Office (a bureau of his department), when accompanied with the

certificate of the Governor of Michigan, under the seal of the State, that the State and its assigns surrender all claim to the land aforesaid, &c., to certify to the State of Michigan a like quantity of land selected in like manner, that is, as provided in the Act of June 3, 1856, upon the new line of road as those surrendered upon the first line; and observe also that it is made "the duty of the Commissioner of the General Land Office to re-offer for public sale in the usual manner the lands embraced in the lists surrendered as aforesaid, when duly filed in his office as herein directed."

III.

Under the foregoing legislation, and especially under this Joint Resolution, the following action was taken by the railroad company, by the State, by the United States and by the public:

1863, May 6. Release by the Peninsula Railroad Company direct to the United States of all its claim to lands on the original line from Marquette to the *Brule River* sufficient to cover 161,104.38 acres (Record, pp. 148, 149).

OBSERVE that this release was not confined to land in in the "clear limits," but covered lands clear down "*to the Brule River, in township 42 north, of range 35 west, to cover 161,104.38 acres,*" that is to say, it included all the lands down to the Wisconsin boundary (Record, pp. 148, 149).

1868, January 31. Formal release by Chicago and Northwestern Railway Co. to the State of Michigan of lands in the "clear limits" of Marquette and State Line branch, 112,145.38 acres, and lands in "common limits" of Marquette and State Line and Ontonagon and State Line branches, giving the description and number of acres.

Record, pp. 151–153.

NOTE that this instrument released all the lands on both branches, except the *clear* lands on the Ontonagon branch, which clear lands were afterwards—to wit, June 17, 1870—released by a subsequent deed, as shown below.

May 1, 1868, the **Governor of Michigan executed a certificate of non-encumbrance and surrender direct to the United States** of the same lands under the seal of the State, and filed the same in the General Land Office in Washington, in accordance with the terms of the joint resolution of July 5, 1862 (Rec., pp. 153 to 155). The lands in the *clear* six miles limits of the Ontonagon branch were not embraced in either of these releases (Rec., pp. 154, 155). The *locus in quo* in the Donahue case was specifically embraced in this certificate as well as in the foregoing release of the railway company to the State of date January 31, 1868.

P. J. Avery, president of the old canal company, and also agent for the State for the selection of lands under the canal grant, having applied to select lands in the six miles limits of the Marquette and Ontonagon branches of the Chicago, St. Paul and Fond du Lac Railroad, **THE COMMISSIONER OF THE GENERAL LAND OFFICE, October 6,**

1869, wrote him that the surrender of the lands along the Marquette branch was complete, and that selections in those limits could be allowed; but that, before selections could be made along the "ABANDONED BRANCH LINE which was to run from the State line to Ontonagon," a release of those lands from the State would be required. "And for this purpose I **transmit herewith a form of release used**" (Rec., p. 121).

December 6, 1869, *the Commissioner of the General Land Office* gave similar instructions to the Register and Receiver at Marquette (Rec., pp. 167, 168).

July 13, 1868, *the Commissioner of the General Land Office,* by letter to the solicitor of the Chicago and Northwestern Railway Company, acknowledged the receipt and filing of the releases from said company to the State, and from the State to the United States, above mentioned, stating that the **release was satisfactory, so for as related to "that portion of the branch line from the Wisconsin State line to Marquette," but that a further release of the list of lands embracing 142,430.23 acres certified to the State for the branch line to Ontonagon would be required before the selections for the Chicago and Northwestern Railway Company could be certified. "The State and railroad company are requested to execute a similar release for said lands, which will complete the matter for both branches"** (Rec., p. 156).

In answer to the request from the solicitor of the Chicago and Northwestern Railway Company for the lists of lands still required to be surrendered, the *Commissioner of the General Land Office* some time between the 25th of April and the 17th of June, 1870, furnished the solicitor of said railway company with the list of 142,430.23 acres granted for the branch line of the Chicago, St. Paul and Fond du Lac Railroad Company to Ontonagon, in Michigan, and on the **17th day of June, 1870,** said Chicago and Northwestern Railway Company, **by deed, released all said lands to the State of Michigan,** to wit, the said 142,430.23 acres, being the lands within the six miles clear limits of the line of road from Ontonagon to the Wisconsin State line (Rec., pp. 158, 159).

August 14, 1870, the Governor of Michigan accordingly executed a certificate of non-incumbrance and surrender to the United States of those lands, and the same was filed in the General Land Office at Washington (Rec., pp. 161, 162). Before executing said surrender the Governor had asked the advice of the Attorney-General of the State of Michigan, and was advised by him that he was fully authorized to do so (Rec., p. 161).

In view of the foregoing correspondence, the release of the 17th of June, 1870, by the railway company to the State, and the surrender of August 14, 1870, by the Governor to the United States, we are unable to understand how the counsel for the other side fell into the error of stating (p. 28) that neither the Ontonagon and Wisconsin State Line Company "nor any of its successors ever executed a release of the land granted for the purpose of building the Ontonagon and State

Line road, or any part of it, and the State of Michigan never released the grant or any part of it to the general Government." This error is repeated in the brief (pp. 37 and 38).

Thereupon, and in consequence of the foregoing action of the State and railway company, and of the Interior Department, there was certified to the State, for the benefit of the Chicago and Northwestern Railway Company, pursuant to the Joint Resolution of Congress of July 5, 1862, along the new line of road, 390,451.89 acres on the Menominee line, or **over 50,000 acres more than had been released** on both the Marquette and Ontonagon lines, besides 127,462.26 acres in addition, which were granted by Act of March 3, 1865, granting four additional sections per mile (Rec., pp. 163 to 165). Also see report of Senate Committee on Public Lands, page 130 of Record, at the bottom.

These several acts were thus understood by all the parties in interest, to wit, the Chicago and Northwestern Railway Company, the Executive Departments of the State of Michigan and the United States, as extinguishing all rights of the State in all the lands granted along the old Marquette and State Line and Ontonagon and State Line branches and vesting the title in the United States.

The understanding of Congress also was that these lands were abandoned (see remarks on passage of Joint Resolution of 1862, Cong. Globe, July 2, 1862; also, on the passage of the bill of March 3, 1865, extending time and granting additional lands, Cong. Globe, February 15, 1865, p. 796).

The lands certified for the Chicago and Northwestern Railway Company in exchange for those so surrendered were *patented by the Governor* to the said railway company (Rec., pp. 177, 178).

After the filing of these certificates of surrender, the agent of the State of Michigan selected lands along the abandoned Ontonagon line, both in the clear limits of the Ontonagon line and the limits common to the Ontonagon and Marquette lines as applicable to the Portage Lake Canal grant. The selections were approved by the Secretary of the Interior **May 22, 1871,** and certified lists were transmitted to the Governor and filed in the **State Land Office** (Record, pp. 44, 45).

The certification dated **May 19, 1871,** approved by the Secretary of the Interior **May 22, 1871,** embraces, *inter alia,* all of the tracts in dispute in these three suits.

NOTE what this certificate, which has the force and effect of a patent, declares and states. Bear in mind that this grant had no defined location; hence, being a float, a grant of quantity, not a grant of lands in place, the Act of Congress necessarily contained some machinery for the purpose of giving definition to it and carry it into effect. The lands to satisfy the grant were to be selected by the State, but that selection was to be submitted to the judgment and the determination of the Secretary of the Interior. Now, what does he decide?

"SUPPLEMENTAL LIST of lands selected by the agent of the State of Michigan in the district of lands subject to sale at Marquette, *and granted to the State of Michigan by Act of Congress, approved the third day of July, 1866,*" &c. (Record, p. 44) [first adjudication]. "*Being lands granted,*" and "*being the vacant and unappropriated lands, designated by odd-numbered sections, nearest the location of said canal*" [second adjudication].

Here are two adjudications by the Secretary of the Interior: First, that the lands therein set out are the lands granted in that act; second, that they are vacant and unappropriated lands nearest the canal. Then the certificate states:

"This is a true and correct list of tracts of lands granted to the State of Michigan by Act of Congress, approved July 3, 1866 [giving its title], and lands designated by odd numbers, not otherwise appropriated," &c. (Record, pp. 44, 45).

The old canal company relied on the acts of the State and United States authorities and accepted the lands in satisfaction of its contract, instead of selecting other valuable lands that could then have been selected.

The lands involved in these suits were selected and approved by the Secretary of the Interior, to fill the Canal Grant and so certified to the State, as appears by the certified lists above referred to (Rec., p. 44; and Donahoe, Rec., p. 6).

In **August, 1874,** all but 5,628 acres, and in **February, 1878,** the full complement of lands granted for the construction of the canal by the acts mentioned had been selected (Rec., pp. 168, 169).

After all these lists (except the last list of 5,628 acres) had been approved, forwarded to the Governor of Michigan and filed in the State Land Office, **the Governor, on June 25, 1875, executed, delivered and filed the certificate of completion of the canal,** which was required by the Act of the Michigan Legislature, for no other purpose than to vest the title to the lands in the canal company, in order that the company should stand seized and possessed of the said lands "as fully as the State can convey the same" (Rec., p. 98).

This act of the Governor was two years after he had made the claim that the lands embraced in the old Ontonagon and State Line limits still belonged to the State (Rec., pp. 132, 133), of course knowing that it operated under the Michigan Act of March 18, 1865, Sec. 4, as a deed of the lands certified, including those selected in the six miles limits of the Ontonagon and State Line branch, and that it was required for no other purpose.

On the faith of these acts of the Governor and of the Interior Department of the United States, the plaintiff below (the present canal company) purchased these lands in good faith for a large sum of money, on the mortgage sale, and has held them from that time (Sept., 1877) until the present time, dealing with them as its own property, making leases and conveyances and paying the taxes thereon to the State of Michigan. These taxes amount to many thousands of dollars (Rec., pp. 102, 103 and pp. 178, 179).

Further action of the Interior Department and of the public on the faith that the lands had been fully surrendered to the United States.

From the year 1867 to the year 1889, on the theory and understanding that said Ontonagon and State Line land grant had been extinguished, **the Government sold, within the six miles limits of that railroad line, 51,600 acres of land in odd sections, and 78,820 acres in even sections, of which there were patented, up to the time these suits were tried in the Circuit**

Court, 16,360 acres of lands in odd sections, and 46,680 acres of lands in even sections (Rec., p. 178).

The purchasers of these lands, as well as the officers of the Interior Department of the United States, considered these lands as having been fully revested in the United States, and, as said by the Senate Committee in their report, with good reason (Rec., p. 131).

IV.

Now, right here is the pivotal point on which the parties differ. The other side maintain that the Secretary of the Interior had no power to consider and act upon the Releases and Surrenders, except as respects the 112,145.38 acres in the clear limits of the Marquette and State Line branch, and that his action in holding that the lands in controversy had been surrrendered and released, and had thus become public lands under his administration was utterly void and of no effect for want of jurisdiction. This we deny, and maintain these two propositions:

1st. That he had jurisdiction and that his decision was right.

2d. If it was wrong it was not utterly void, but at most voidable at the instance,

and only at the instance, of the United States.

When these Releases and Surrenders were made and filed in the Interior Department the people came into the Land Department and said these are now public lands and we want to enter them at $1.25 per acre, and the United States sold in regular course to the public 78,820 acres in the even sections and 51,600 acres in the odd sections, many of which have been patented.

See details in table in Record at p. 178.

The people also came in and claimed to make pre-emption and homestead claims on these lands, and this was allowed; and the agent of the State of Michigan, under the Canal grants, also came in and said, "They are public lands, and we want to select some of them to fill the Canal grant." All these things came up in the Interior Department for action and decision. Had nobody any power to act? Is this a country without law? Is it a country without anybody authorized to act on these important questions, *and, if not, who was authorized to pass upon them?* Under the legislation applicable to the canal company, under the Joint Resolution of July 5, 1862, and under the general legislation of Congress, putting the administration of the public lands in the hands of the Secretary of the Interior, his department was authorized to act upon these matters. In very fact, *nobody else had the power.* Nay, more! Turn to Sections 3, 4 and 5 of the Joint Resolution of July 5, 1862, and you will find that the Secretary of the Interior is not only authorized to act, but IS REQUIRED TO ACT ON ALL OF THESE MATTERS. And yet they say he has no jurisdiction!

And here we must repeat what was urged on the trial—that it is an entire misconception, a palpable solecism, to say that the Secretary had the power to act if he makes a right decision, and no power to act if he makes a wrong one.

Such a doctrine will, of course, never do! For manifestly neither the Court, the Secretary of the Interior, nor any other tribunal or officer, can pass upon the question whether these lands, either in the clear or in the common limits, were the *public lands of the United States*, without passing both upon a question of law and of fact. The Secretary of the Interior was vested with that power. The canal grant says that these lands are "to be selected," and these selections are to be approved by the Secretary of the Interior; and, in the exercise of his express and even specific powers and duty under the joint resolution of July 5, 1862, he construed these various releases, from the company to the State, and from the State to the United States, as restoring these lands, every acre both in the clear and common limits, on both the Marquette and Ontonagon branches, to the public domain of the United States.

Suppose, for the sake of the argument, we admit that that was a wrong decision: is it void? If it is void so far as this canal company is concerned, it is equally void as to every acre which was sold at private sale during this time, *i. e.*, every year from 1871 to 1889 (Rec., p. 178); it is equally void as to every acre that was allowed during this long period to be pre-empted or and homesteaded. It is equally void for all lands selected given to the Chicago and Northwestern Railway Co. on the new line for the 142,430.23 acres of "clear lands" surrendered on the Ontonagon line. For, if they had not been surrendered, the title was in the State; and any

Court assumes a very grave function, enters upon a very delicate and serious business, and should ponder long and well, when, after these documents have been acted on by the officers of the Government and of the State to whom is committed the decision in these matters for a long series of years, on which great and important rights have vested, it assumes to hold that all this is void from beginning to end—utterly void, not simply voidable, but utterly void; "that there is no health in it."

The difference between a void and voidable act is world-wide and vastly important. If *void* then not only the secretary's solemn decision embodied in his certified list is void, but all rights during a period of over twenty years based thereon—sales, mortgages, improvements, payment of taxes, &c., fall to the ground, to the confusion and destruction of all interests concerned. But if only *voidable*, then if it was a mistaken decision, the Government is not remediless. Not at all; for it would be competent for the United States to go into a court or equity if it deems itself injured, as has been held time and time again, to avoid that act; but it is not obliged to do it.

And when the Government does go into a court of equity, to avoid its own grant, it goes just like any other suitor—with no prerogative.

It goes in on its equities, and it gets equitable relief if it is entitled to it; which is right. It will not get it if it is not equitably entitled to it, which is also right. How much more benign and just such a doctrine than the blind, destructive, uncalculating doctrine that these solemn acts of the Secretary of the Interior are utterly void *ab origine*, which intercepts, prevents and disables the United States from doing justice if it so desires,

and which prevents a court of equity from embracing the transactions within its beneficent jurisdiction if the United States seeks to do injustice towards those who have acted upon the faith of the decisions and adjudications of the Secretary of the Interior.

V.

The leading decisions of this Court on the subject of the validity of patents for lands carefully reviewed, and shown to establish the proposition that the certification of the lands in question by the Secretary of the Interior, May 22, 1871 (Record, pp. 44, 45), **was not void, and if erroneous (which is denied) it was at most only voidable, and cannot be collaterally assailed in these ejectment actions.**

It is a question of great moment to all persons who hold under patents of land from the United States to know how far such patents may be collaterally impeached by strangers in an action of ejectment.

The general answer to this question is very plain. If the officer issuing it had no jurisdiction to act in the matter the patent is void, and this may be shown by those who can connect themselves with the title, by proper evidence in an action at law. On the other hand, if the officer issuing the patent had jurisdiction t o act in the matter, but made a wrong decision upon the law and facts, the patent is not void, but at most only voidable at the suit of the Government.

This Court has so determined time and time again. On this precise point it is enough to refer to the observations of MILLER, J., in U. S. vs. Schurz, 102 U. S., 378, and of BROWN, J., in Noble vs. Union River, &c., R. R. Co., 147 U. S., 165.

Cases where the United States has brought bills to annul patents, and what is said in the opinions in such cases, have no real relevancy to the question in the cases at the bar, where strangers to the title seek to impeach the patent in a collateral action.

The actual cases in ejectment in which a patent for lands has been held void, and where it has been held that it may be collaterally impeached by strangers, are not numerous. Such a power is very dangerous, and, unless clearly defined and limited, would work intolerable mischief. Such cases in this Court, when critically considered, will be found to constitute a very small and distinct group, and to have no real bearing upon, much less to be decisive of, the cases at bar against the position of the Canal Company.

They all resolve themselves into cases where some officer of the United States has issued a patent for land which did not belong to it, or which had been reserved from sale, and, in such reservation, withdrawn from the jurisdiction of the Land Department or of the officer issuing the patent.

Every experienced lawyer and Judge shares Lord ELDON's horror and dread of general and unqualified propositions. The exact doctrine of the Court can be known only by a critical examination of the cases.

Such examination we now purpose to make, except so far as the subject has been already presented in our main briefs. We refer now to cases which hold that a

patent may be shown to be void collaterally in an action at law between third persons.

On this subject the following are the leading cases in this Court, and are believed to be all of any importance.

The earliest case is **Polk's Lessee vs. Wendell, 9 Cranch., 87, 1815.** Ejectment. Plaintiff claimed under a patent issued by North Carolina April 17, 1800; defendant under a patent from North Carolina, dated August 28, 1795. In 1789 North Carolina ceded to Congress the territory in which the lands in dispute lie, reserving all existing rights under the State, which were to be perfected according to the laws of North Carolina (p. 100). The Court held (as correctly stated in the head note) that "after the cession of land by North Carolina to the United States the former had no right to grant those lands to any other grantee who had not an incipient title before the cession; and the question whether such incipient title existed is therefore open at law." "A patent is void at law if the State had no title, or if the officer who issued the patent had no authority to do so;" but "in general," says the Court, for reasons which it gives (p. 99), "a court of equity is the more eligible tribunal for these questions (concerning the validity of a patent), and they ought to be excluded from a court of law."

This was, therefore, simply a case where North Carolina issued a patent for land which it had previously ceded to the United States, contrary to the act of cession.

This case is cited by our opponent (p. 66), but when its facts are considered, what possible bearing it has upon the cases at the bar, is not perceived.

Opposing counsel refer (p. 67) to the case of **Patterson vs. Winn, 11 Wheat., 381.** In this case it was claimed that the patent of the State of Georgia to one

Basil Jones, for 7,300 acres of land, including the *locus*, was void for the reason that the laws of Georgia prohibited the issue of a patent to one person for more than a thousand acres of land. The Court held that the laws of Georgia did not so prohibit the issue of patents, and sustained it. What bearing the point here adjudged has on the cases at bar is not apparent.

The next two cases (referred to by our opponent in his brief at pp. 68, 71), are where patents had been granted by the United States for lands claimed under old Spanish concessions made before the United States acquired title. We refer to the cases of

Stoddard vs. Chambers, 2 How., 248, 1844, and Easton vs. Salisbury, 21 How., 426, 1858.

Ejectment for lands in Missouri: The plaintiff in the first-named suit claimed under a Spanish concession; the defendant under a New Madrid location and patent. In both cases above cited the contest was between these two sources of title. By Acts of Congress "all lands claimed under a French or Spanish title, which claim had been filed with the Recorder of Land Titles, as the plaintiff's claim had been, were reserved from sale by the Acts of Congress above stated;" the reservation from sale was absolute; "no such tract shall be offered for sale" (2 Howard, p. 317). By an Act of Congress it was provided that "the holder of a New Madrid certificate had a right to locate it only 'on public lands which had been authorized to be sold.'"

A New Madrid certificate was located on lands thus reserved, and a patent issued thereon July 16, 1832 (2 How., p. 317). In 1836 Congress confirmed the plaintiff's title. It was held that the plaintiff's title thus confirmed was good.

"A confirmation by Act of Congress," said the Court, "vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence of this (2 How. p. 316). The defendants' title was void, because his New Madrid certificate was located on lands which were not 'part of the public lands authorized to be sold,' but, on the contrary, were lands 'expressly reserved from sale;' and the Court held that the question thus presented is one "as well examinable at law as in chancery'" (pp. 316, 317).

Here the decisive feature was that the lands patented were "not part of the public lands authorized to be sold," but by statute "expressly reserved from sale;" that is, wholly withdrawn from the administration of the officer who issued the patent, with no power on his part to act upon the question or to make any decision concerning it. What unfavorable bearing these cases have on our cases we are unable to see.

The next case to which we refer is one where a patent was issued for part of the "Fort Leavenworth Military Reservation." It is not referred to by opposing counsel. We refer to it although it was not an ejectment, but the case of a bill in equity by the United States to annul the patent. The case is that of the **United States vs. Stone, 2 Wall., 525, 1864.** This was a bill by the United States to cancel a patent issued to Stone in 1861, as assignee of certain Delaware Indian chiefs, for part of Fort Leavenworth

military reservation. The bill was sustained. The boundaries of the reservation had been clearly established under Acts of Congress and action of the President and War Department in 1830, 1839 and 1854. Under the treaty of May 6, 1854, with the Delaware Indians, the southern line of the reservation was recognized by the Indians as the boundary of their cession to the United States.

The treaty of May 30, 1860, allotted to each of certain chiefs "a tract of land" to be selected by themselves from the body of the lands reserved to the tribe by the treaty of May 6, 1854, for its "permanent home," the lands selected to be patented in fee by the President.

Instead of selecting the lands in question from the specified body of the lands, certain tracts within the admitted and established boundaries of the Fort Leavenworth reservation were selected and patented pursuant to a decision of the Secretary of the Interior in 1861, that the lands lying between the fort and the southern line of the reservation belonged to the Delawares, and ordered surveys to be made north of that line.

The Court (GRIER, J., p. 537) says:

"The Secretary of the Interior, in 1861, transcended his authority when he attempted to overrule the acts of his predecessors and ordered surveys to be made north of that line [the established line of the reservation] to include the land in question."

The decree below canceling the patents was affirmed.

The essential and obvious feature of the case is that the Secretary of the Interior had no authority in any act of Congress or treaty to deal with the land embraced in the military reservation; on the contrary,

the said Acts of Congress and the treaties recognized that reservation as the boundary of the Delawares' lands *and expressly excluded the power and jurisdiction of the Secretary of the Interior to deal with it as part of the public lands of the United States falling within his power to administer or deal with.* The patent was clearly voidable, possibly void. As the suit was one by the United States in equity to cancel the patent, the Court had no occasion to determine, and of course did not determine, whether it was absolutely void (in the strict sense of the word) or only voidable.

We next refer to the case of **Reichart vs. Felps, 6 Wall., 160, 1867,** also cited by opposing counsel (p. 71). Ejectment for lands in Illinois. The plaintiff claimed under two patents issued by the United States in 1838 and 1853, respectively. The defendant claimed under an old French grant confirmed under an Act of Congress of June 20, 1788, by an instrument duly executed by the proper official February 12, 1799. The Court held that the plaintiff's patents were void because the United States never *had any title to the land*—a very plain case, but one which has no bearing upon the cases at the bar.

The praise of Judge LOCKWOOD'S opinion in Moore vs. Hill (Breese, Ill. Rep., 236, s. c. 1 Ill. Rep., 304) is well merited. It is referred to hereafter in connection with the Confirmatory Act of March 2, 1889.

The next case is that of **Best vs. Polk, 18 Wall., 112, 1873,** which is not cited by opposing

counsel. Ejectment. Plaintiff claimed under a patent from the United States dated March 13, 1847. The defendant had the title of an *Indian Reservee conferred by the Treaty* of May 24, 1834, with the Chickasaw Indians. This title was located June 17, 1839. The Court held "that the treaty conferred title to these reservations, which was complete when the locations were made to identify them," and "did not need patents to perfect them" (p. 116); therefore, the patent of 1847 to the plaintiff was void, for that it "attempted to convey lands that had been previously *granted*, reserved from sale or appropriated," that is to say, land to which the United States had no title.

The case of Morton vs. Nebraska, 21 Wall., 660 (cited by opposing counsel, p. 72), was one where the *reserved saline lands* were patented when the officer had no jurisdiction to act upon the subject, and where such lands were entirely withdrawn from administration in his department.

The case of Newhall vs. Sanger, 92 U. S., 751 (cited by our opponent, p. 44), is one where land was patented under a railroad grant which was part of an old *Mexican grant*, and whose status was expressly declared to be "not part of the public domain of the United States" (p. 763); compare U. S. vs. McLaughlin, 127 U. S., 428, and Carr vs. Quigley, 149 U. S., 653, explaining and limiting *Newhall vs. Sanger*.

The case of Leavenworth, &c., R. R. Co. vs. United States, 92 U. S., 733, is one where part of an *Indian reservation*, to which the Indian title

had not been extinguished, was patented to fill an ordinary railroad grant, and the case was not ejectment, but a bill by the United States to cancel the patent.

The case of Kansas Pac. Ry. Co. vs. Dunmeyer, 113 U. S., 629, was one where the Court sustained the action of the Secretary of the Interior in issuing the patent; here the defendants ask the Court to overthrow the patent or certification of the Interior Department.

Doolan vs. Carr, 125 U. S., 618, 1887. This is much relied on by our opponent (p. 57). It was an ejectment by Carr against Doolan and McCue. The United States patented the land to the Central Pacific R. R. Co. under the Pacific Railroad Act of July 1, 1862, by patent dated February 28, 1874, and the Central Pacific Company conveyed it June 10, 1874, to the plaintiff. The defendants offered to show by documentary evidence that the land was covered by an *old Mexican grant made in 1839, confirmed by the proper authorities of the United States* long before the defendant's alleged title had its inception (p. 633). On November 10, 1882, Doolan and McCue entered on the land under a claim of pre-emption settlement. Each made a declaratory statement of his intention to claim and pre-empt the land; but the Register of the Land Office refused to receive it on the ground of the existence of the patent to the railroad company. The Circuit Court rejected the evidence, holding the patent conclusive in this action, and could only be attacked in a direct proceeding by the United States to vacate it (p. 624), and ordered judgment for the plaintiff.

The Supreme Court reversed the judgment and ordered a new trial.

Observe that this case was one where the documentary evidence offered showed title out of the plaintiff under the old Mexican grant, confirmed of record by the authorities of the United States, or under which Mexican grant claims were asserted at the time the route of the Railway Company was definitely fixed. The Circuit Court rejected this evidence and refused to allow that proof or any part of it to be made. For this radical error "of the Court in rejecting this evidence and in the instructions given to the jury on the same point," that the patent was conclusive, the Supreme Court reversed the judgment and ordered a new trial.

Obviously, the majority of the Court treated the case as falling within the principle of *Polk's Lessee vs. Wendell*, *Stoddard vs. Chambers*, *Easton vs. Salisbury*, *Reichard vs. Felps*, *supra*, and the cases which follow these, holding that an attempt to patent lands which the United States did not own was void.

Clearly this case of Doolan vs. Carr is not applicable to the cases at the bar. For in that case the Land Department undertook to patent lands which had been ceded by the Government of Mexico before we conquered that country, and which were in litigation at the time in the tribunals of the United States, if not actually confirmed by the authorities of the United States. Now that has no sort of bearing on our case, because the Secretary of the Interior, unlike our case, was not vested with any jurisdiction in that matter. *But here in our case he is the only officer that is appointed to determine, and it is expressly made his duty to determine, what lands shall be selected and taken to fill the grant.*

THE OTHER CASES CITED BY THE OPPOSING COUNSEL fall within these same principles, and are inapplicable to the cases at bar. Thus the case of **Shepley vs. Cowan, 91 U. S., 330, 1875,** was an attempt to pre-empt land, under the Act of September 4, 1841, part of the "commons of the Village of Carondelet" which had been confirmed by Congress June 13, 1812, which Act was "a present operative grant of all interest in the United States in the property used by the inhabitants of said village as their commons." It was therefore a case where the United States had no title which could be acquired under the Act of 1841.

The case of **Sherman vs. Buick, 93 U. S., 209,** was a contest for a part of a certain Section 36 between a patent of the United States and a patent of the State of California. The California patent was held void because the State of California had *no title to the land patented,* and that by the terms of the Act of Congress under which she claimed she had only the right of seeking indemnity. The Federal patent was accordingly sustained.

Smelting Co. vs. Kemp, 104 U. S., 636, was an action at law. Plaintiff claimed title to a placer mine under a patent from the United States. The attempt to defeat it and to have it held void in this action at law was unsuccessful. This case was cited and approved in Steel vs. Smelting Co., 106 U. S., 447, which latter case we refer to *infra.*

THIS REVIEW OF THE PRINCIPAL CASES where patents have been held void at law justifies the statement above made that they constitute a very small and distinct group consisting of cases arising out of old Spanish and Mexican and other concessions where the

United States never had any title, or of cases where patents had been issued for military, Indian, saline or other reservations, where the Interior Department was not only not given power to act, but where the subject matter was entirely withdrawn from his jurisdiction.

What bearing have such cases, or the principle on which they rest, upon the cases at the bar, where, as above shown (and see also our main brief, pp. 69–84), the Secretary of the Interior is by the joint resolution of July 5, 1862, not only authorized, but required to act in respect to the very lands and matters on which he acted when he issued the certified lists of May 22, 1871, and which recite and embody his decisions and adjudications (Record, pp. 44, 45)?

Cases at Bar Distinguishable From Those in Which Patents Have Been Held Void at Law and Grounds of Such Distinction Based on the Joint Resolution of July 5, 1862, Stated.

How wide the cases cited by our opponent are from the cases at the bar is obvious. All of the cases cited, and all cases decided by this Court that hold patents void at law are distinguishable from the cases at bar, in that none of them dealt with a case where what had been confessedly public lands have, by virtue of certain statutes, documents and executive action, been surrendered back to the United States with a view again to make them part of the public domain.

The very purpose of Section 5 of the joint resolution of July 5, 1862, in requiring the lists of the railroad lands to be filed with the Commissioner of the

General Land Office, accompanied with the certificate of surrender by the Governor, *was to restore them to the public domain and to enable the Secretary of the Interior to deal with them as public lands.* In cannot be denied, that he was authorized, aye, even required, to examine that legislation and those documents, and to determine whether the surrender was effectual, and to what extent. This was the contemporary construction put upon the Joint Resolution by the Interior Department, by the railway company and by the Governor of the State of Michigan. It is admitted by the counsel for the other side that the releases and surrenders of 1868 were authorized and effectual, at least, as to the clear lands on the Marquette line (Brief, p. 85). This is because, he argues the Secretary decided the matter right. But he claims that all other releases and surrenders were void, because the Secretary of the Interior made a wrong decision. In other words, maintaining the solecism that the power to act depends upon whether that action is correct or incorrect.

The Secretary's power to make this decision is, we repeat, expressly conferred by Section 5 of the Joint Resolution. Let it be specially remembered that that section requires the Secretary of the Interior to act whenever certain documents for such action are presented to him by the railway company interested and the Governor of the State. The Secretary of the Interior in this case volunteered no action, nor did he act until the accredited and specified evidence was presented to him by the railway company interested and the Governor, and he was thereupon required to act. Here we have all the elements of jurisdiction—power, in its nature judicial, conferred; a tribunal or officer

authorized to act, and parties interested demanding action. That is precisely what happened in this case. The power conferred by the joint resolution of 1862 slumbered until 1868 and 1870, when the State and Railway Company interested called it into action. Not only, therefore, have we here all the elements of jurisdiction, but it is also to be ever borne in mind that the joint resolution goes further, and purposely and particularly specifies the evidence on which he shall proceed in acting and deciding. It is that upon the filing in the General Land Office of the lists of the said railroad lands in whole or in part, as now selected and certified in the General Land Office, with the certificate of the Governor of the State of Michigan under the seal of the State that the said State and its assigns surrenders all claim to the lands aforesaid set forth and described in the lists thereof thus certified, and that the same have never been pledged, sold or otherwise incumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land, etc. These lists were filed as there required. There was also filed, as thus required, the certificate of the Governor, under the great seal of the State, that the State surrendered all claim to the lands. The Secretary was thus not only authorized, but required, to determine whether those lists had been filed as required, and also whether such certificate of the Governor had been filed as required.

It is undisputed that the lists were filed, and that such a certificate was filed; but the other side insist that notwithstanding all the requirements of Section 5 were literally complied with, the Secretary was obliged to go beyond the Joint Resolution and examine the local legislation of Michigan and ascertain whether

the Legislature had passed some act authorizing the Governor to file the certificate. That is not in the Act of Congress, but entirely outside of it, and we insist that the filing of the lists and the certificate of the Governor gave the Secretary the power to act when called upon (as he was) to do so; and that such action would be even binding upon the State of Michigan, because the State acted upon it and selected land in lieu of those thus surrendered. But, whether that would be so or not, it must be true that the State of Michigan not objecting, but standing by its action, it does not lie with these defendants, who intruded on this land years afterwards, and who claim nothing under the State, to set up that all this was void and of no effect. Therefore, we insist that the decision of the Secretary of the Interior was authorized, and that it would be unimpeachable even by the United States.

This action would be unimpeachable even by the State of Michigan, as we pointed out in our main brief (p. 84 *et seq.*). The Congressional joint resolution only required the act of the Governor to make the surrender complete, and provided that on the filing of his certificate of surrender, etc., other lands should be certified to the State in exchange for those surrendered. Such was the joint resolution. Now the Legislature of Michigan, by Act of March 18, 1863 (quoted in our main brief, p. 35), confirmed the grant as authorized by the Congressional Joint Resolution of July 5, 1862, unto the Peninsula Railroad Company. This Congressional action was thus accepted by the Legislature of Michigan with all of the terms and conditions of the Joint Resolution of July 5, 1862, and by its terms thus accepted by the Legislature of Michigan, the Governor was authorized to execute

the surrender on which the Secretary of the Interior was to act, and on whom devolved no duty of looking behind the signature of the Governor and the great seal of the State to ascertain whether the Legislature had authorized the action. Our main brief presents the argument in support of these positions more in detail (p. 84, *et seq.*).

WE NOW PROCEED to show that the cases at the bar fall within the principle of other decisions of this Court to the effect that the Secretary of the Interior did, under the legislation applicable to the subject, have jurisdiction to issue the certification of May 22, 1871.

VI.

The cases at the bar fall within the doctrine of other decisions of this Court holding that the Secretary of the Interior had jurisdiction to issue the certification of May 22, 1871 (Record, pp. 44, 45), **and that it cannot be collaterally impeached in an action at law by one who either has no rights in the land at all, or, if any, rights that arose subsequent to such certification.**

Under the Joint Resolution of July 5, 1862, and the various Releases and Surrenders, the Secretary of the

Interior has decided that these lands, listed and certified to the State, were "*lands granted to the State of Michigan by the Act of July 3, 1866*" (*see certificate of May 22, 1871, printed in the Record, pp. 44, 45*).

The list so states in express terms; and the Acts of Congress, and especially the Joint Resolution of July 5, 1862, committed the decision of this question expressly to the Secretary of the Interior.

It must be borne in mind that the lands were granted by the United States for the sole purpose of aiding the State to build and complete a specified harbor and canal. The State accepted the grant for this purpose. It contracted with the old canal company to build the canal, and granted the lands to the company in consideration of its constructing the canal. *The State neither gave nor agreed to give any other consideration.* It made its Governor the judge whether the canal had been completed according to contract. And to this the United States agreed, by the Canal-granting Act of July 3, 1866.

The Governor decided upon great care that the canal and harbor had been built and completed as required by the laws of Michigan and of the United States. [*See text of Governor's certificates in the Appendix to our main brief, pp. 149-154.*] This decision was put in solemn form, and ordered to be and was made, for the guidance of the public, *a matter of record in the office of the Secretary of State and Register of Deeds.* And the State enacted (and Congress approved the Act of the State, and by adoption made it its own), that when the Governor makes his certificate of the completion of the canal,

"it shall be evidence of the facts therein set forth, and the said company shall thereupon stand seized and

possessed of said lands, as fully as the State can convey the same ; and the said *company may, after having received such certificate, sell and dispose of said lands as the absolute owner thereof" (Michigan Act, March 18, 1865, Section 4. See text thereof in our main brief, pp. 5-7).*

What lands did the State and Congress thus agree should be the lands of which the company was declared to be the "absolute owner," and which it might "sell and dispose of" on such certified completion of the canal? They were the lands which it had been agreed in the canal Acts of March 3, 1865, and July 3, 1866, and its acceptance by the State, should be selected by the State's agents and approved by the Secretary of the Interior.

Before the canal was finished the selections had been made by the State through its agents and approved by the Secretary of the Interior in due form, and true and correct lists thereof were made, certified and delivered to the State. By the certified completion of the canal the title of the State and its grantee, the old Canal Company, to the lands thus certified to the State, was complete. For the only right reserved by the United States in the grant was that if the canal should not be completed within the time specified, the lands hereby granted shall revert to the United States *(Sec. 5, of the Canal Act, March 3, 1865.)*

IT WILL BE OBSERVED THAT DUTIES of a similar character were, by the legislation in question, *devolved upon the Governor, and upon the Secretary of the Interior.* That is, it was made the exclusive duty of the Governor

"To determine whether the said canal and harbor have been constructed by the said company as required by said Act of Congress, and in conformity

with said plans and specifications" *(Michigan Act March 18, 1865, referred to, supra, Sec. 4).*

The effect of the Governor's certificate of completion of the canal is determined in the case of the United States vs. California & Oregon Land Co., 148 U. S. 31, 1892.

And it was made the exclusive duty of the Secretary of the Interior *to determine whether the lands selected to fill the grant were lands which fell within the class of lands granted by the act.*

WE HAVE NOW TO DETERMINE THE LEGAL EFFECT of the action of the Secretary of the Interior in respect of the matters thus committed to his jurisdiction. Fortunately, this is so well settled by the decisions of this court that really all that it is necessary to do is to ascertain with precision what has been decided and then apply the principles thus authoritatively established to the question in hand.

The principle of law applicable to the powers of the Secretary of the Interior is the well-known doctrine that when a special officer or tribunal is authorized to deal with a given matter or to determine a given matter of fact, the decision of the officer or tribunal is final, unless otherwise declared by the law itself, or unless it can be impeached for fraud, or on other equitable grounds.

Pertinent Cases Decided by this Court Showing the Jurisdiction of the Secretary of the Interior in Certifying the Lands in Question under the Canal Grant.

From the decisions of this Court we select several pertinent cases which we consider to establish the proposition that the Secretary of the Interior under the legislation and documents applicable to the transaction had the power to act upon the matter of what lands were of the class subject to be selected for the canal grant, and that his determination thereof embodied and expressed in his certification is, even if erroneous (which we deny) conclusive in these actions of ejectment.

Take the case of **Doe vs. Wilson, 23 How., 457.** Ejectment. In a treaty made with the Indians they ceded to the United States certain tracts of land —except certain reservations in the ceded tracts— among which was a reservation to Pet-chi-co of two sections. The language of the reservation was: The United States agree "to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." Then follows this sentence: **"The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall be surveyed, and the boundaries to correspond with the public surveys."**

Now what did the President do? The treaty was that he was to make the selections *within* the ceded limits. That was the power—*within* the ceded limits.

According to two cases—this one of Doe vs. Wilson, and its sequel, Crews vs. Burcham—it was offered on the trial of the ejectment action to be shown that in making these selections he did not keep *within* the ceded lands, but had gone and selected land *outside*. Our opponents in the cases at bar would say that patent, if it was for land *outside* of the ceded limits, was void. The President in such a matter has no more power than the Secretary of the Interior.

"In January, 1837, patents were issued to Pet-chi-co and his heirs for the two sections mentioned in the treaty. In 1845 certain persons obtained a deed from the heirs of Pet-chi-co, and under this deed the plaintiffs claim upon the ground that the deed from Pet-chi-co in 1833 was invalid. Wilson claimed under a later deed. The leading questions in the case were, therefore, whether Pet-chi-co had the right to make the deed when it was made."

The Court in that case was asked to instruct the jury (p. 463)

"that the defendants cannot claim or hold the land as assignees of Pet-chi-co, by virtue of the treaty, if the lands embraced in the patents to Pet-chi-co did not lie within the section of country ceded by the treaty of 27th October, 1832."

This demand for instruction was refused. The Court say:

"There is no evidence in the record showing where the land granted by the patents lies, except that which is furnished by the patents themselves. They recite the stipulation in the treaty in Pet-chi-co's behalf; that the selections for him of sections nine and ten had been made, 'as being the sections to which Pet-chi-co is entitled' under the treaty. *The recitals in the patents conclude all controversy on this point.*"

Thus the Court held that in this action of ejectment the patent was conclusive.

In the subsequent case of **Crews vs. Burcham, 1 Black, 352**, which was also an action of ejectment, the same principle was affirmed. The point was again made that a portion of the land embraced in the patent, which was given under a treaty with a tribe of Indians, by which certain reservations selected *within* the lands ceded by the Indians were to be patented, *did not lie within the district ceded*, and hence was void for want of authority in the officer to issue it. If the claim made was correct, as a matter of fact, there was no authority to issue such a patent. The Court, NELSON, J., says:

"The same objection was taken in the case of Doe vs. Wilson, and the answer given was, the recitals in the patent, that the sections were those selected by the President, and to which the reservee was entitled under the treaty, *were conclusive on the point; and we may add that certainly no third party had any right to complain if the facts were as alleged.*"

This, it is submitted, covers every point in the cases at the bar, for in the cases at the bar the certification of the lands in question by the Interior Department sets forth that the lands described are lands "*granted under the Act of Congress of July 3, 1866*, being the vacant lands designated by odd numbers, *not otherwise appropriated*," &c.

Record, pp. 44. 45.

Such was the solemn decision of the Commissioner of the General Land Office and of the Secretary of the Interior, deliberately made, after a careful examination of the laws and documents pertaining to the matter. Such decision cannot be held void in a collateral proceeding. On the authority of the above two cases in this Court (Doe vs. Wilson and Crews vs.

Burcham) we insist, in the language of Justice NELSON, that in this form of action "the certificate was conclusive, and that no third party had the right to complain or raise the objection." We have never been able to see why these two cases were not in principle decisive of the cases at the bar in the plaintiff's favor.

So, too, the case of **United States vs. Schurz, 102 U. S., 378**, in principle covers precisely the cases at this bar. Here a homestead entry, followed by a patent, was made of lands *which were not subject to such homestead entry, because under the Act of March 2d, 1867, the land thus entered was within the limits of an incorporated town;* and it was thereupon contended that the patent was absolutely *void* and that *no* title whatever passed by force thereof. But this Court held otherwise, and that the patent was at most voidable, and voidable only at the instance of the Government if it could make a case entitling it to relief on equitable grounds. This case is especially in point, because the patent was issued contrary to the express terms of the said Act of March 2, 1867 (14 Stats., 541).

The reasons for the judgment of the Court are relevant to the subject under consideration, and are thus stated by Mr. Justice MILLER:

"It is argued with much plausibility that the relator (the pre-emptor and patentee) was not entitled to the land by the laws of the United States, because it was not subject to the homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land. We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

"But the *distinction between a void and a voidable instrument*, though sometimes a very nice one, is still

a well-recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. *To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry and sale.* **The question whether any particular tract, belonging to the Government, was open to sale, pre-emption or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers.** *Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.*

"It is clear that the right and duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. *When their decision of such a question is finally made and recorded in the shape of a patent, how can it be said that the instrument is absolutely void for such errors as these?* If a patent should issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by a patent to another who held possession, it might be held void in a court of law on the production of the senior patent. *But such is not the case before us.* Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. *The whole question is one of disputed law and disputed facts.* It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. *If they decided erroneously, the patent may be voidable, but not absolutely void.*"

These principles are equally applicable here. The question here is whether the land which had once been public land had by virtue of the releases and express surrenders to the United States been restored to the public domain. This was a question of fact and law for the Secretary of the Interior to decide before he approved the selections. He did decide it, and decided it, as we claim, correctly. It is therefore unimpeachable even by the United States. Even if he decided it erroneously, the list and certificate which embodied such decision would not be void—at most it would be voidable.

This subject is further discussed in our main brief at pages 72, 73, 84.

So too, in the case of **Steel vs. Smelting Company, 106 U. S., 447,** (cited also by opposing counsel in his brief, p. 75,) the Smelting Company had a patent from the United States to the lands in question. The action was ejectment. The defense of the defendant is thus stated by the Court:

"The amended answer averred that the defendants were the owners of the land in controversy 'by superiority of possessory title and priority of actual possession' of the premises as a part of a *town site on the public domain of the United States,* located and occupied since June, 1860; that the title of the plaintiff was derived from one Thomas Starr, to whom a patent was issued by the United States, bearing date on the 29th of March, 1879, embracing the premises in controversy; *and the special defenses set up were that the patent was void; that fraud, bribery, perjury and subornation of perjury were used to obtain it; and that Starr, the patentee, was estopped by his conduct from asserting title to the premises.* The patent which is subsequently stated to be a mineral patent, by which is meant that it issued upon a claim for mineral land, is averred to be void on these grounds; that the land which **it embraces was part of the town site of Leadville when the claim originated, and was**

thus reserved from sale by the laws of Congress; that the land included in the town site was neither mineral nor agricultural; and that the patentee, Starr, was not a citizen of the United States, and had not declared his intention to become one when the patent was issued. These grounds are accompained with a detail of the facts upon which they are founded, but they are sufficiently stated for the disposition of the questions arising upon them."

The Court held that a patent executed in the required form and by the proper officers, for a portion of the public domain, which is by law subject to sale or other disposal, passes the title thereto, although such land was *reserved* by law from sale as part of the town site of Leadville, and the finding of the facts by the Land Department which authorizes its issue is conclusive in a court of law. Smelting Company vs. Kemp, 104 U. S., 636, is cited upon this and approved. The Court said:

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the *effect to be given to the action of that department*, overlook our decisions on the subject. *That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily*, therefore, it *must consider* and *pass upon* the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and **whether it is of the class which is open to sale.** Its *judgment* upon these matters is that of a special tribunal, and is *unassailable*, except by direct proceedings for its annulment or limitation. Such has been the *uniform language* of this Court in *repeated decisions*."

One of the latest cases in this Court is that of **Chandler vs. Calumet & Hecla Mining Co., 149 U. S., 79, 1892.** Ejectment. In 1887 the State of Michigan patented the land to the plaintiff as part of its swamp-land grant under the Act of 1850. In 1852 Congress made a grant of land to Michigan of lands to build a ship canal—very much like the canal grant of 1866 now under consideration. The agent of the State selected the land in question to satisfy the canal grant, and the Secretary of the Interior in 1855 approved the selections and certified them to the State under the canal grant, and the State patented them to the canal company in consideration of the construction of the canal. HELD that the canal company got the title by this patent. HELD also that this title could not be impeached by oral evidence that the lands were in fact swamp land. The patent was conclusive upon the State at law, and could be impeached, if at all, only by bill in equity (p. 93).

The conclusive character, in collateral actions, of the adjudication of the Interior Department as to what lands are of the character contemplated by the grant is recognized and emphasized by this Court in the latest case on the subject. We refer to **Barden vs. N. P. R. R. Co.,** 154 *U. S.*, , decided the 26th of May last.

The granting act of Congress then under consideration *expressly excepted mineral lands* from its operation. Our opponents would say that the Interior Department had *no power* or *jurisdiction* to approve and patent selections of mineral lands, and, therefore, any patent issued for such lands would be *absolutely void* for want of authority in the officer issuing it. But this Court, FIELD, J., said :

"It is the established doctrine, expressed in numerous decisions of this Court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake its determination is conclusive against collateral attack."

If the patent has been issued unadvisedly, without investigation, the Court says the consequence must be borne by the Government, until, by further legislation, a stricter attention by the officers of the Land Department can be enforced.

"**The fact remains,**" says the Court, "**that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the Government to the grantees, reposes in the officers of the land department.** * * * The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued, in proper form, upon a judgment rendered after a due examination of the subject by officers of the land department charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the Government from contending to the contrary, and as we have already said, in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

In that case the land department had made no adjudication, and therefore the character of the lands—whether they were covered by the grant or not—was an open question for the Court; but if there had been such adjudication, it would have been held conclusive. In our cases the Secretary of the Interior determined, in 1871, that the lands in controversy had been duly

surrendered, and were applicable to the Canal Grant, and such adjudication must be conclusive in this case.

The very object of Section 5 of the Joint Resolution of July 5, 1862, in requiring "lists to be filed in the General Land Office with the certificate of the Governor," was that these documents should be acted upon by the Secretary of the Interior, and yet the other side say he had no power to act unless he decided right!

His decision is expressed in these words:

"This is a true and correct list of the tracts of land *granted* to the State of Michigan *by the Act of Congress approved the 3d day of July, 1866*, entitled 'An Act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior' [first adjudication], *being the vacant lands* designated by odd numbers, *not otherwise appropriated* [second adjudication] in the district of lands subject to sale at Marquette, in the Upper Peninsula, and selected nearest the location of said canal."

Record, pp. 44, 45.

The opposing brief also makes the point that the selection and certification to the canal company were void, because the land in question was not subject to private sale.

There are several conclusive answers to this position.

(A) The lands were certified May 22, 1871, to the State for the benefit of the canal company by the Secretary of the Interior, who, in his said certificate, states that the same are

"lands *granted* to the State of Michigan by the Act of Congress, approved the third of July, 1866, entitled 'An Act granting lands to the State of Michigan to aid

in the construction of a ship canal and harbor at Portage Lake, Keweenaw Point, Lake Superior,' in said State, *being the vacant and unappropriated lands* designated by odd numbers nearest the location of the canal."

The said act of July 3, 1866, unlike, in this respect, the previous act of March 3, 1865, does *not* require the lands to be "subject to private entry." On the contrary, the descriptive language of the grant is that "there be and is hereby granted to the State of Michigan, to aid in the building of said canal, 200,000 acres of lands in the Upper Peninsula, in the State of Michi- and gan, and from lands to which the right of homestead pre-emption has not attached," * * * "to be selected from lands of the *United States*;" that is to say, the act of 1866 dropped the words "private entry" and only required the lands to to be "selected from lands of the United States."

If the two grants be construed in *pari materia*, as our opponents contend they should be, it would not sustain their contention. Matters of detail, left unprovided for in the second grant would be controlled by the first, *e. g.*, that the lands are to be selected by an agent appointed by the Governor of the State, and subject to the approval of the Secretary of the Interior.

But where the second act itself provides for such details, the first has no application. The Act of 1865 provides specifically that the lands shall be "from any lands subject to private entry" and that said

"sections shall be made from alternate and odd numbered sections of land nearest the location of said canal in said Upper Peninsula not otherwise appropriated, and not from lands designated as 'mineral' by the United States before the passage of this act, nor from lands to which the rights of pre-emption or homestead have attached."

All the details of this nature are specifically provided for in the Act of 1866, as follows: The grant is in addition to a former grant for the same purpose, approved March 3, 1865, and is for

"two hundred thousand acres of land in the *Upper Peninsula* of the State of Michigan, and *from land to which the right of homestead or pre-emption has not attached; provided*, that one hundred and fifty thousand acres of said lands *shall be selected from alternate odd-numbered sections*, and fifty thousand acres *from even-numbered sections of the lands of the United States.* * * * *And provided, further, that no lands designated by the United States as 'Mineral' before the passage of this act shall be included within this grant.*"

Here are all the directions in detail, as to the class of lands from which selections are to be made, and they include all the details of like nature that are found in the first act, except the requirements that they are to be selected from lands *nearest the location of the canal* and from lands *subject to private entry.* In this particular therefore, the second act does not refer to the first for details, but furnishes them itself. The omission of these two conditions, under these circumstances, is conclusive that they were not intended to be required. This question arose before the completion of the canal selections, and was submitted by the Secretary of the Interior to the Attorney-General for his advice.

IN AN OPINION OF THE SOLICITOR-GENERAL, APPROVED BY THE ATTORNEY-GENERAL, dated March 11, 1874 (14th Vol. Opinions of Attorney-General, p. 636), the following question of the Secretary is passed upon: "Is the State of Michigan required to select lands to satisfy the additional grant of July 3, 1866, from those nearest the said canal?" To which the following reply is given:

"It is very doubtful whether a Court can see its way to such a construction of the Act of 1866, above cited, as will render the land grant therein contained subject to the condition expressed in that of 1865, also above cited, by which the lands to be *selected* are to be those 'nearest' the contemplated line of the canal. The question, what was the intention of Congress in any particular legislation, can be solved in general only by reference to the words which Congress has used therein. The Act of 1866 is brief and plain, as is also that of 1865. The former employs some of the terms used in the Act of 1865 to characterize the lands given. Some of them it omits. Nothing occurs to me sufficient to show that the omission was not deliberate. It is true that this act is herein a departure from the system of legislation in regard to land grants, which is based upon what is called the principle of *prudent proprietorship*, and therefore include alternate sections only, and those of lands nearest the improvement in aid of which they are given. This act varies from this system in both particulars. It allows of a selection of *every section* for one hundred of those given, and omits a clause, usual in such legislation, confining the selection to the neighborhood of the line of the canal.

"Although there may be enough in the case to excite a scruple, I know of no rule which, where the language is as plain as that of the Act of 1866, would justify a tribunal in refusing to give effect to the particular intentions of Congress as *expressed in the words that have been used*."

SUBSEQUENTLY, ON RECONSIDERATION OF THE QUESTION AND FURTHER EXAMINATION, April 4, 1874 (14th Vol., Opinions of Attorney-General, p. 645), the following further answer to the question is given:

"I. I have considered this question more closely than at the time of my communication of the 11th ultimo, but with the same conclusion.

"I admit the existence of the rule '*in pari materia*,' and question only the measure of its application to the statute before us, that of 1866. If there were a general statute providing that all donations of land for works of internal improvement should be confined to such as are *nearest* the work to aid which they are given, the omission of such provisions in donations by

a particular statute would, of course, be unimportant. Even if the case before us were one in which all other statutes making donations for like purposes manifested a policy of confining the donation to lands 'nearest' its work, while the statute under consideration omitted all qualifications of that sort, it would be a matter of doubt whether it should not be read as implying as much. The exact case is, however, in the first place, that previous statutes of this kind, while requiring, almost without exception, that the land given shall be taken in one degree or another of vicinage to the work in contemplation, are by no means agreed that they are to be such as are 'nearest;' *next*, that a previous act in relation to the canal question confined the selection to such lands as are 'nearest' to it; *then*, that the present act contains no other provision upon this point except that the lands shall be within the 'Upper Peninsula.' If there were no other acts on the subject of such donations than the two in relation to this canal, it seems to me plain that the omission of the word 'nearest' in the second would be regarded as *intentional*. There is nothing upon the face of the second act to indicate that such omission was *inadvertent*. If there were an absence of *detail* in its description of the lands given, there would be much better ground for referring for them to the previous act. But it seems herein to rely on itself for details, *i. e.*, to give its own details. If so, what it omits is as significant as what it retains.

"I will not further dwell upon the reasons which prevail with me to say that the Portage Company is not required to take the additional two hundred thousand acres given it by the Act of 1866, from such lands as are 'nearest' to its canal.

"II. The Act of 1865, which confined the *selection* of the lands given to a narrow range, specifies *details* for this proceeding; that of 1866, in which the range of selection is much more indefinite, gives none. I think this furnishes an apt illustration of the class of questions in which interpretation is to be gathered *in pari materia*.

"The first proviso of the Act of 1866 declares that the lands are to be 'selected.' The Act does not expressly enact that they shall be selected, but, as it were, refers to their selection casually in a proviso bearing on this subject. As to the manner of the selection, the statute is, upon its face, 'doubtful,' and this

lets in the Act of 1865 as being '*in pari materia*' (Sedge, &c., 247). *Here* Congress says, in effect, for details see former statute; while as regards the former point, that of specifying the lands subject to selection, it gave details itself.

"I therefore think that the Act of 1866 plainly indicates that the additional lands are to be taken by selection made by an agent of the Governor of Michigan, subject to the approval of the Secretary of the Interior, for effectual selection involves not only the judgment of the former, but that of the latter as well."

But it is urged by opposing counsel that the commission of the Governor to Mr. Avery to select the lands confined him to lands *subject to private entry*, and therefore selections made in violation of THAT direction were void (Brief, p. 43).

In other words, the Governor of Michigan, by direction in the commission, *could and did limit a grant made by Act of Congress.*

Congress empowered the Governor to appoint the agent to select the *lands granted by it*, not to direct from what class of lands they should be selected. That direction was made by Congress. The agent was appointed to select the lands "in conformity with the provisions and under the restrictions" of the Act of Congress, and a mistake of the Governor in the description of class of lands intended could not affect his power to select "in conformity with the terms" of the act, much less invalidate such selection after it had been approved by the Secretary of the Interior and acted upon by the State.

(B) The lands in controversy were unquestionably the public lands of the United States. They had been surveyed and were public lands subject to sale at and prior to the railroad grant of June 3, 1856. The

record shows that they had once been offered for public sale prior to the railroad grant, and the case of Eldridge vs. Sexton, 19 Wall., 80, where the lands had never been offered at the minimum price, is not applicable. The lands are public lands of the United States, even if they had never been offered.

(C) Again, the certification or patent of the Secretary of the Interior, if it is worth anything, is conclusive, in an action at law, against a collateral attack on such a ground.

VII.

The title of the Lake Superior Ship Canal, Railway and Iron Company was confirmed, if not already perfect, by Section 3 of the Act of Congress, approved March 2, 1889, 25 Statutes at Large, page 1008. [Reprinted in full in the Appendix to our main Brief, at pp. 164–166.]

The subject is so fully covered in our main briefs that we only add a few considerations in reply.

By Section 3 of the Act of March 2, 1869, the title of the Canal Company is absolutely confirmed, unless the defendants had thereon

" *bona fide* pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed " (Sec. 3).

One of the defendants, FINAN, confessedly entered on the land claimed by him *after* May 1, 1888; to wit, not before May 12, 1888 (Record, p. 145). So that our title by confirmation is absolute as to him; and yet the judgment of the Circuit Court went against us.

As to CUNNINGHAM, the question as to time is whether his pre-emption claim was made on May 25, 1888 (which is too late) or March 28, 1888 *(see facts in our main brief, p. 114)*.

As to DONAHUE he offered his declaratory statement on a tract on the "common limits" claimed by him April 11, 1883, in time to give him the benefit of Section 3, of the Act of March 2, 1889, if he is otherwise entitled to it *(see facts in our main brief, p. 115)*.

All of the defendants admit that they knew that the lands were not public lands of the United States, and for that reason all of their claims were rejected by the Land Department, and stood rejected when the confirmatory Act of March 2, 1889, was passed.

The defendants throughout the trial proceeded upon two conflicting theories. They tried to ride two horses going in opposite directions. To defeat the plaintiff's title they insisted, and now insist (which is the whole burden of the brief on the other side), *that the land was State land, the title thereto being in the State of Michigan by virtue of the railroad grant of June 3, 1856.* To get a status as pre-emptors they insist that the land *was public land of the United States subject to pre-emption, and as such they attempted to acquire it.* Objections were duly taken to the admission of any proof of their pre-emption claims, but the objections were overruled and the plaintiff excepted (Record, p. 142). The instructions, Nos. 8, 9 and 10, on this subject asked by

the plaintiffs ought to have been given (Record, pp. 183, 184).

A.

Even if the lands had been public lands subject to pre-emption, and the defendants had duly offered to pre-empt the same, Congress had the power to pass the confirmatory Act of March 2, 1889, a fortiori it had such power under the circumstances of this case.

This question of power is settled by the cases of *Frisbie vs. Whitney*, *Atherton vs. Fowler* and the *Yosemite Valley case*, referred to in the margin.*

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*The nature and extent of the rights of one who attempts to pre-empt public lands (for it was "assumed that the lands in question were open to pre-emption") makes a settlement, and applies to the proper land officers to make his declaration of intention to occupy and cultivate the land, which they refuse to receive, were considered by this Court in the case of **Frisbie vs. Whitney, 9 Wall., 187, 1869.** Frisbie had been in possession under a Mexican grant for years; his title suddenly failed, the land became public land. Whitney entered upon the land in the night, and sought to pre-empt it. Congress passed an act to protect the *bona fide* holders of the old Mexican grant; and it was claimed that Whitney had acquired vested rights which Congress could not interfere with. But this Court decided that a settlement even upon the public lands of the United States, no matter how long continued, conferred no rights against the Government; that a vested right under the pre-emption laws is only obtained when the purchase money has been paid and the receipt of the proper land officer given to the purchaser; the Court expressly sanctioning the doctrine that

"the land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement and paid the requisite purchase money."

B.

The confirmation of the title of the Canal Company being made by an Act of Congress, it is in law and legal effect a legal grant of the land to the Canal Company nunc pro tunc, that is to say, as of the date of the certification to the State for the benefit of the old canal company (under which the present company derives title), to wit, May 22, 1871 (Record, pp. 44, 45), **and is CONCLUSIVE FROM THAT DATE as against the United States, and as against the defendants unless they were within the ex-**

After referring to Whitney's attempt to "grab" the lands occupied and claimed by Frisbie, which attempt the Court below recognized, Justice MILLER says:

"If there be any principle of law which requires this, the Court must be governed by it, but it is idle to pretend that such a decree would be founded on natural justice" (p. 192).

And in **Atherton vs. Fowler, 96 U. S., 513,** where a pre-emptor of the Whitney type entered upon the possession of Page and cut hay, the same Justice said:

"No law gave them the right to make such an entry; that they were mere naked trespassers upon the enclosure of another—an enclosure and occupation of years, on which time and labor had been expended—and that in such a wrongful attempt to seize the fruits of other men's labor there could be no *bona fide* claim of right whatever" (p. 520).

To the same effect is **The Yosemite Valley Case, 15 Wall., 77.** Justice FIELD, commenting upon the rights of pre-emptors in a case where the land is subject to pre-emption, and all the steps required are complied with, says:

"The United States by those acts (the Pre-emption Acts) enter into no contract with the settler, and incur no obligation to any one that the land accepted by him shall ever be put up for sale. * * * The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or appropriate them to any public use. * * * It is the only construction which preserves a wise control in the Government over the public lands."

ception, that is to say, unless they were on May 1, 1888, bona fide pre-emption or homestead claimants within the meaning of the last proviso of Section 3 of that act.

The propositions contained in this point are not open to any fair question. Assuming, as shown in our main brief, that the Canal Company is embraced in Section 3, the declaration of that section is that its "*right and title shall be and is hereby confirmed,*" that is to say, confirmed as of May 22, 1871, when the lands were certified by the Secretary of the Interior to the State under the Canal Grant of July 3, 1866. Such is the adjudged effect of a confirmation by statute. Some of the cases on this subject are referred to in the margin; and the cases of *Choteau vs. Eckhart*, *Les Bois vs. Bramell*, and *Landes vs. Brant*, cited in the note, not only adjudge the confirmation to relate back to the original patent or certification, but also adjudge the principle that the confirmation of the right and title of the Canal Company by Section 3 of the Act of March 2, 1889, is conclusive against the United States and the defendants, of the existence of a pre-existing title dating from May 22, 1871, unless the defendants are *bona fide* pre-emption claimants within the meaning of the last proviso of that section.

The case of **Landes vs. Brant, 10 How., 348, 373,** exhibits the doctrine of relation in the case of a confirmed grant in a very striking way. Washburn's statement of what was decided in this case is so accurate that we quote it. He says:

"In Landes vs. Brant, the title in question was an imperfect one, in the original claimant, under the Spanish government; and a creditor of the one holding this title seized and sold his title on execution;

and, subsequently to this, the United States confirmed the title to the original claimant. It was held that by relation he was the real owner when the sale was made, and consequently the purchaser under the sheriff's sale held the land against the devisees of the original claimant. The Court quote from Cruise with approbation, as applicable to such cases: 'There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation'" (3 Washburn on Real Property, p. * 587, 5th Ed., top p. 328).

If an ordinary conveyance *en pais* would have such an effect by the doctrine of relation, *a fortiori* how much more so when the confirmation is by an act of Congress which intends to make good from the beginning the acts of Government officials, and to that end confirms *ab origine* the title which its officials undertook to confer. The legislative act of confirmation operates not only as a conveyance but a STATUTE OR A LAW ENACTED by proper authority declaring the force and effect of such conveyance, which is that the title of the confirmee is made effectual for all intents and purposes from the time of its inception.*

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*In Hoffnagle vs. Anderson, 7 Wheat., 212, the Court says: "It is not doubted that a patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, *and has always been held conclusive against all those whose rights did not commence previous to its emanation*" (Approved in Spencer vs. Lapsley, 20 How., 272).

"The *confirmor* (under Blackstone's definition, 2 Bl., 325), or those claiming under him, would not be permitted to deny the pre-existing title in the *confirmee*. The confirmor, or those claiming under him, would be estopped by his deed" (Moore vs. Hill, 1 Breese, 236; s. c., 1 Ill., 304, pp. 313, 316; approved by the Supreme Court of Illinois, 33 Ill., 439; and by the Supreme Court of the United States in Reichart vs. Felps, 6 Wall., 160, 165).

This principle as to the conclusive and retroactive effect of the Confirmatory Act has several important bearings on the rights of the parties—both the plaintiff and the defendants—for it must be remembered that the Act of March 2, 1889, is more than a mere conveyance by way of confirmation. *It is a law as well as a conveyance* (Ryan vs. Carter, 93 U. S., 78, 82; Langdeau vs. Hanes, 21 Wall., 521, 529; Tripp vs. Spring, 5 Sawyer, 209, 216, FIELD, J.).

(A) *As to the plaintiff.* It compels it to take these lands thus confirmed to it. The lands in controversy

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In the case of **Choteau vs. Eckhart, 2 How., 345,** Congress by an act passed June 13, 1812, confirmed to the inhabitants of certain towns in the Louisiana Purchase their rights and titles to certain lands and commons in and adjoining the same. The action was ejectment; the defendant claimed title under the Act of 1812, and the plaintiff claimed title under a concession made by the Spanish Government, which was confirmed by Congress in 1836. It was thus a case of claims for title under conflicting confirmations. The case of **Les Bois vs. Bramell, 4 How., 449,** was a similar case.

"The only question," says CATRON, J., in the subsequent case of **Landes vs. Brant, 10 How., 348,** "decided in Choteau vs. Eckhart, 2 How., 345, and in Les Bois vs. Bramell, 4 *ibid*, 449, was, that when Congress confirmed and completed an imperfect claim and then confirmed another and different claim for the same land, the older confirmation defeated the younger one; nor could a court of justice go behind the first confirmation and ascertain from facts and title papers which claimant had the better original equity. That if this was allowed then the first confirmation could be overthrown by the courts, and the action of the political department (in all cases of double confirmation) would have no conclusive force when the courts were resorted to."

Now, in the case of Choteau vs. Eckhart, *supra*, although the plaintiff's confirmation by the Act of 1836 was held to be void and ineffectual, because of the prior confirmation under the Act of 1812, yet the Court says (and that is applicable to the cases at bar):

"That the plaintiff's title is *prima facie* a good legal title, and will support an ejectment under the Act of 1836, standing alone, if

are part of the 400,000 acres, which were the sole consideration for building the canal.

By Section 3 of the Act of March 2, 1889, the Congress of the United States says that the title of this canal company to the lands selected "*is hereby confirmed.*" Suppose we wanted to say—and under the views of the counsel of the defendants we are entitled to say—that the certification of these lands for the canal company in 1871 is void, and we have never had these lands, and we go on and select lands in lieu thereof somewhere else. Wouldn't the Government of the United States say to us: "You can't do it. In 1871 these lands were selected for the canal company, they

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the land can be identified and confirmed without resort to the patent. This Court held in Strother vs. Lucas, 12 Peters, 410, 'That a grant may be made by a law as well as by a patent pursuant to a law, is undoubted, *and a confirmation by law is as fully to all intents and purposes a grant, as if contained in terms a grant de novo.*'"

The case of LesBois vs. Bramell, *supra*, decided another point applicable to the present controversy.

By the Confirmatory Act of June 13, 1812, says the Court (4 How., 457), Congress provided that the rights, titles and claims to town or village town lots, common field lots and commons, in, adjoining and belonging to St. Louis and other towns, should be and the same were thereby confirmed to the inhabitants, etc. "That this was a general confirmation of the common to the town, as a community, no one has ever doubted, so far as the confirmation operated on the lands of the United States; and the question is whether the plaintiff's claim was excepted directly, or by reason of a prior right vested in the plaintiff. The only direct exception in the Act of Congress is the proviso "that nothing herein contained shall be construed to affect the rights of any persons claiming the same lands or any part thereof, whose claims have been confirmed by the Board of Commissioners for adjusting and settling claims to lands in said Territory." After referring to the powers of the board, etc., the Court adds: "The foregoing were the only descriptions of title excepted from the Act of 1812, and as the plaintiff's was not one of them the act did not apply to it in the saving clause" (4 How., p. 458; see, also, cases cited in our main brief, p. 113).

were certified to the State for its benefit; your grantors accepted them; you have held on to them from that day to this; and in 1889 Congress of the United States said, 'Your title is hereby confirmed,' making it good and valid from the beginning?" Wouldn't it be binding on us? If the decision below in the cases of CUNNINGHAM and FINAN is right, we could select other lands; but, when we should offer to do it, the Government could say, "Your title is confirmed, and you have got to keep the lands." Would we not be bound to keep them and be content?

The Confirmatory Act operates, therefore, as an estoppel both on the United States and on the canal company, and that estoppel dates back for all purposes to the inception in May, 1871, of the title confirmed.

(B) *As to the defendants.* Unless they are within the last proviso or saving clause of section 3, the Confirmatory Act confirms the title of the canal company from the date of the original certification, to wit, May 22, 1871, and "*estops the confirmor or those claiming under him to deny the pre-existing title of the confirmee*" *(see cases in note, ante, p. 59).*

If this be so, it follows that the Circuit Court erred in holding in the Cunningham case that the confirmation would not "relate back to the date of selection for the purpose of maintaining an action brought in the meantime." Why not? (Record, pp. 56, 57, note.)

The principle, therefore, that you cannot maintain ejectment on a title acquired after action brought (which we do not dispute) has no application. Our title dated not simply from March 2, 1889, when the Confirmatory Act was passed, but from the inception of our title and rights, May 22, 1871 (which that act

confirmed), as against the United States and all persons claiming under it since that date.

If CUNNINGHAM was not confirmed, then he was a mere intruder, and as such, he is, 1st, estopped to deny the pre-existing title of the canal company. And, 2d, being a mere intruder, he cannot question the title conveyed by the certification of May 22, 1871, even if it had not been confirmed. This proposition is the subject of POINT I. in our main brief (p. 50), where the cases, State and Federal, are cited. In support of it we cited among the cases, the case of Ehrhardt vs. Hogaboom, 115 U. S., 67. We now refer to case of Wright vs. Roseberry, 121 U. S., at pages 518, 519, where the former case is approved.

In Wright vs. Roseberry, *supra*, the plaintiff claimed title under the swamp-land grant of September 28, 1850, by conveyance from the State of California made years prior to the initiation of the defendant's claim under the pre-emption laws of the United States. This claim of title had been recognized by the Land Department, and followed by patents. The question was whether these patents were valid as against the grantee of the State under the swamp-land grant of 1850. The effect of these patents is thus stated by the Court, FIELD, J. (p. 518):

"These patents were evidence that whatever title the United States then held passed to the patentees, and as against a mere intruder without claim of title from a paramount source were conclusive that the lands were of the character which, by the patents, they were represented to be. This was the case of *Ehrhardt vs. Hogaboom*, 115 U. S., 67. There the plaintiff claimed by a patent issued to his grantor under the pre-emption laws. The defendant admitted he was in possession of twenty acres, and contended that these were swamp and overflowed lands, which passed to the State under the Act of 1850. It appeared, how-

ever, that the certificate of purchase, which he produced, did not embrace the lands in controversy, and his offer to prove the character of the land as swamp and overflowed by parol was rejected. The Court said: 'He was as to the twenty acres a simple intruder, without claim or color of title. He was, therefore, in no position to call in question the validity of the patent of the United States for those acres, and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it.' And again: 'It is the duty of the Land Department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title.' But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source or by a prior conveyance from a common source."

In such a case—a contest between two grantees of the United States—the Court held that the prior valid grantee of the United States could show as against a subsequent grantee of the United States, even at law, that "the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States" (p. 519). But the subsequent grantee cannot in an action of law thus assail the rights of the prior patentee. His right to do so is excluded, not only by the language of the Court, but by the reason of the thing; at all events, a mere intruder cannot do so, as held in Ehrhardt vs. Hogaboom.

A fortiori the defendants cannot dispute our title, it having been confirmed by Act of Congress.

C.

The defendants are not within the last proviso or saving clause of Section 3 of the Confirmatory Act, and consequently they are mere intruders and trespassers, as to whom our title stands absolutely confirmed nunc pro tunc.

The subject is fully considered in our main brief (pp. 114 to 122), to which we refer. We add here a few further suggestions and authorities:

Congress, in the Act of March 2, 1889, was settling competing equities, and it said to the canal company, "We hereby confirm your rights and title," but subject to this proviso:

"That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were *bona fide* pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed."

If there are any such claimants, Congress says: "We confirm their rights in preference to the rights of the canal company."

Observe that the requisites are:

1st. There must have been, on May 1, 1888, upon the land a pre-emption or homestead claim in fact.

2d. Such claim must be *bona fide*, and arise or be asserted by actual occupation of the land; and

3d. Such claim and occupation must be under color of the laws of the United States.

OBSERVE that Congress does not confirm, as in some cases it has done, the claims of all actual settlers or occupants. This is practically the defendant's contention (his brief, p. 95). Observe that it does not even confirm all homestead and pre-emption claimants, but only those *(a)* who are such *bona fide*, and *(b)* who have entered under color of the laws of the United States. "All *such*," but only "such"—"pre-emption and homestead claims are hereby confirmed."

"Bona Fides" and "Color of Title," What?

How can one be a *bona fide* pre-emptor who knows at the time that the lands are not open to pre-emption? How can one enter under color of the laws of the United States when he enters in the face of those laws and knows that they give him no right whatever to do so. "*By color is meant an apparent or prima facie right*" (3 Bouvier's Inst., Sec. 2931). It cannot mean less than this.

In addition to the cases cited in our main brief on the subject, the question what constitutes "color of title to lands" has been several times defined by this court. Thus, in **Wright vs. Mattison. 18 How., 50, 56,** it was said by Mr. Justice DANIEL:

> "The courts have concurred, it is believed, without an exception, in defining 'color of title' to be that which, in appearance, is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been whether there was an apparent or colorable title under which an entry or a claim has been made in good faith."

This language was quoted and applied as the test to determine "*good faith*" in the case of Cameron vs. United

States, 148 U. S., 301, construing and applying the Act of Congress of February 25, 1885 (23 Stats., 321, c. 149), providing that all enclosures of public lands of the United States, where the persons making the enclosure

"had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States, are declared to be unlawful and forbidden."

Justice BROWN makes the above quotation from *Wright vs. Mattison*, and also quotes the case of Gregg vs. Sayre, 8 Pet., 244, where it was held that a deed purporting to convey a title in fee, which was fraudulent as to the grantor, which the grantee had accepted in good faith, was held to be color of title.

The case of **Trenouth vs. San Francisco, 100 U. S., 251, 1879,** construes a confirmation act, similar to the Act of March 2, 1889, in favor of the views above presented. That case was thus: The Act of Congress of March 8, 1866, whose occasion and purpose are traced by FIELD, J., in **Trenouth vs. San Francisco,** confirmed to the city her claim to certain lands,

"upon trust, however, that all land not previously granted to the city should be disposed of and conveyed to the city by parties in the *bona fide actual possession thereof, by themselves or tenants, on the passage of the act.*"

The plaintiffs were in actual possession of certain lots when the said Act of March 8, 1866, was passed, and brought suit to charge the defendants as trustees of the legal title for their benefit. It appeared, however, that the plaintiffs had intruded by trespass upon the

actual possession of others, and that their possession existing at the date of the passage of the Act of 1866 had been thus acquired. "One of the intruding parties afterwards set up a claim that he entered as a pre-emptioner under the laws of the United States" (p. 256).

The Court says:

"The District and Supreme Courts of the State were of opinion that, upon his [plaintiff's] own showing, his grantors, the intruders mentioned, were never in the *bona fide* possession of property within the meaning of the Act of Congress; and we agree with them in that respect. The claim of one of the intruders as a pre-emptioner was equally unfounded; 1st, because the right of pre-emption under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others; 2d, because the lands were claimed under a foreign title—that of the Pueblo from Mexico—the claim to which was then pending before the tribunals of the United States."

That is to say, knowledge by this attempted pre-emptor of a pending claim to the lands by others excluded him from the category of *bona fide* actual possessors within the meaning of the Act of Congress. This test is fatal to the claims of the present defendants.

The case of **Deffenback vs. Hawke, 115 U. S., 329,** is conclusive against the defendant's "*bona fides*" and "claim under color of title." That was an ejectment action. The betterment statute of the Territory (of Dakota) Section 641 of the Code, contained the following provision:

"In an action for the recovery of real property upon which permanent improvements have been made by the defendant, or those under whom he claims, *holding under color of title* adversely to the claim of the plaintiff, *in good faith*, the value of such improvements must be allowed as a counterclaim by such defendant."

The Act of Congress of June 1, 1874 (18 Stats., 50), entitled "An Act for the benefit of occupying claimants," also provides that

"when an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal Courts to all the rights and remedies given or secured by the statutes of the State or Territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made."

Observe that the language of this betterment statute involved is that the defendant claiming the betterments must hold *(a)* "under color of title"—this is the first requisite—*(b)* "and adversely to the plaintiff in good faith"—this is the second requisite. The Court, therefore, had to construe the words *color of title* and the words holding adversely *in good faith*.

In this case the defendant set up by way of counterclaim under the statute a claim for permanent improvements on the premises in controversy, claiming title thereto in good faith against all persons except the United States, and claiming the right to acquire the title from the United States (p. 396). On demurrer the Court held that the defendant was not entitled to the benefit of the statute, and this was affirmed by the Supreme Court, which, after quoting the statute, says (p. 407), FIELD, J., delivering the opinion:

"The case presented by the defendant is not covered by the provisions of this law. There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law, purporting to transfer to him the title or to give him the right of possession."

This test applied to the defendants in the cases now under argument is conclusive that they are not claiming under any color of title, for the reason that they did not hold on May 1, 1888, and do not now, under any "instrument, proceeding or law purporting to transfer to them the title or to give them the right of possession." The opinion of the Court proceeds:

"**And there can be no such thing as good faith in an adverse holding, where the party knows that he has no title, and that under the law, which he is presumed to know, he can acquire none by his occupation.** Here the defendant knew that the title was in the United States, that the lands were mineral, and were claimed as such by the plaintiff, and that title to them could be acquired only under the laws providing for the sale of lands of that character; and there is no pretense that he ever sought, or contemplated seeking, the title to them as such lands, or claimed possession of them under any local customs or rules of miners in the district."

The foregoing test is also decisive against the *bona fides* of the defendants in the case at bar, because they knew that the land did not belong to the United States, and that the proceedings initiated by them could never ripen in the acquisition of a title under the pre-emption or homestead laws of the United States, and this, whether the lands belonged to the State or to the canal company.

The foregoing extracts are in striking conformity in language and doctrine with the views of Judge SEVERENS expressed on the argument below (see pointed brief of Mr. DILLON, page 71).

Other cases bearing on the subject of color of title and *bona fides* are in our main brief (pp. 119–121).

The Court ought, therefore, to have given in the Cunningham and Finan cases the 8th, 9th and 10th

instructions asked (see our main Brief, pp. 52-55, note for text of these instructions).

It erred in refusing them and in ordering verdicts for the defendants.

Specific Reply to Certain Suggestions in the Brief of Opposing Counsel

It is contended by the opposing counsel that our claim that the plaintiff's title was confirmed by the Act of March 2, 1889, cannot be maintained (p. 89).

FIRST. It is said the canal company's title is excepted from the general provision of Section 3, "by the specific mention of and complete provision for it in the second proviso of Section 2."

We have discussed this question in our principal brief, and have shown that the confirmation of "STATE SELECTIONS" could apply, and was intended by Congress to apply to no other than these very *canal* selections (pp. 123 *et seq*), and that the confirmatory provisions of Section 3 were formulated after the provisions of Section 2, and as additional thereto, instead of in limitation thereof (pp. 131 to 137).

SECOND. They say "the Canal Company and its selections from the old railroad grant are not within its terms"—*i. e.*, the terms of Section 3. How ignorant of the force of ordinary English words Senators HOAR, TELLER, SPOONER, PALMER, PLUMB, GEORGE, CALL, DOLPH and others must have been to spend several days discussing this provision of Section 3, on the theory that its *sole effect* would be to confirm the canal selections! (Debates, pp. 86 to 122.) What labor they would have been saved if they had only had the counsel to instruct them as to the meaning of the words they were considering! How strange that

among all the Senators there was not one learned enough to show the opponents of the measure that they were frightened at something less than a shadow!

The canal selections, we are told, were not selections "under color of the public land laws." There are *public* acts and *private* acts. It cannot be claimed that the canal grant is a *private* act. It is a grant by Congress to a State. It is a *law* which courts and the whole public are bound to know. It is one of the public land laws; as much so as the various grants to the several States for school purposes.

Again it is said that these canal selections were not required to be "*confirmed*" by the Secretary of the Interior, and were not, in fact, *confirmed* by him. They were to be selected subject to his "*approval*," and they were, in fact, *approved* by him.

The language "consideration received by the Government," says the counsel, cannot apply to these selections. To what selections could it apply? What consideration is received by the Government for swamp and school lands, indemnity selections, which, the counsel concedes (p. 94), were covered by this confirmatory clause? They were gratuities. But the consideration of the canal grant was the construction of the canal to be a public highway and subject to public control.

There is no evidence in the case that there were any State selections under "indemnity swamp land grants, agricultural college scrip to the States and the like" within the forfeited limits, as claimed by the opposing counsel in his brief (p. 94). In fact, the members of Congress who framed the section did not seem to know of any such, though they did know of the canal selections, and were acting solely with reference to them in this confirmation of "State selections."

Again, it is said that the first clause of Section 4 which declares that none of the forfeited lands "shall inure to the benefit of any State or corporation to which lands may have been granted by Congress, *except as herein otherwise provided*," excludes the canal company.

In the first place, the present canal company never had received a grant of lands from the United States. It had *bought* lands in good faith, and for value, which had been granted to the State, and by it to another corporation.

As well might it be said that State is excluded by this provision. But the State had made *selections*, confirmed by the Secretary of the Interior, had procured the consideration to be paid by the construction of the canal, which consideration was still, at the date of the act, retained by the Government, and the present canal company was and is "holding or claiming under such disposal;" therefore, its right and title is confirmed, and as to these selections the State and present canal company are within the words "except as herein otherwise provided."

But counsel says (p. 95) that the corporations which came within the words "except as herein otherwise provided" are the railroad corporations referred to in in the first proviso of section one, which reads:

"Provided that this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted."

Then, read with the first clause of Section 4, it would amount to this: No lands *declared forfeited* by this act shall inure to the benefit of any corporation to which lands may have been granted, except rights of way and depot grounds, *which are not declared forfeited by this act*, at all.

Counsel feebly suggests (for he does not argue it) that "Section 5 protects persons who have settled upon any of the railroad grants which are forfeited by the Act" (p. 95). The obvious purpose of that section was not to enlarge or change the class of pre-emptors and homesteaders who were confirmed by the last proviso, or saving clause, of Section 3, but to provide for another and distinct subject; namely, that all those who, whether confirmed, or under the general provisions of the laws of the United States, were entitled to enter the land under the homestead law, should be allowed when making final proof for the time they had resided upon and cultivated the same.

FINALLY, the opposing counsel has failed to perceive that the position he urges destroys the case of his clients.

They are on the canal selections, He says these canal selections are not "State selections," and hence are not confirmed by Section 3. If so, his clients' cases are not confirmed, for the last proviso of Section 3, on which his clients' alleged pre-emption rights rest, is by its terms confined to pre-emption and homestead claims in "such State selections," *i. e.*, State selections of the class which are confirmed by the previous portion of Section 3. If the defendants are not on "State selections," they are not confirmed at all. And so, curiously enough, the counsel's position excludes his clients from the possibility of being within the saving clause in favor of pre-emption and homestead claims.

JOHN F. DILLON,
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For the Canal Company.

Office Supreme Court, U. S.
FILED.
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CLERK.

Supreme Court of the United States

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, *Plaintiff in Error*,

vs.

WALTER A. CUNNINGHAM.

49

SAME, *Plaintiff in Error*,

vs.

HUGH FINAN.

50

MICHAEL DONAHUE, *Plaintiff in Error*,

vs.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY.

51

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

Proceedings and Debates in Congress

(*Extracted from the "Congressional Record"*)

ON THE

Michigan Railroad Land Grant Forfeiture Bill

AND THE

Confirmation of "STATE SELECTIONS" by the Act of Congress of March 2, 1889 (25 Stats. at Large, p. 1008), submitted to the Supreme Court as part of the Argument in Support of the Title of the said Canal Company.

JOHN F. DILLON,
DAN. H. BALL,
For the Canal Company.

C. G. Burgoyne, Walker and Centre Sts., New York.

SYNOPSIS AND INDEX TO THE DEBATES Which are herewith Reprinted and Submitted as Part of the Argument for Lake Superior Ship Canal Railway and Iron Co. in the Cases above entitled, pending in the Supreme Court of the United States.

1888. BILL 1430, to forfeit all unearned grants in United States (see p. 125, Debates).

POLICY OF COMMITTEE—viz., to forfeit and stop there, and let parties affected come afterwards to Congress or go to the Courts (Debates, pp. 2, 4, 90).

History Proviso to Sec. 2: Canal company in it, and Dawes and Hoar represented it (pp. 2, 90). DAWES (Debates p. 1), HOAR'S amendment (pp. 2, 3), PALMER'S amendment (p. 4), BERRY'S amendment (p. 5), rejected (p. 14).

May 3, 1888. *Hoar-Palmer* proviso passed (Debates, p. 14).

NOTE.—A. *Proviso* to Sec. 2, Act March 2, 1889, is the Hoar-Palmer amendment literally, with the added words *as hereby declared.*

B. Was meant for the two companies' (Canal and Brulé River) benefit; now sought to be used to knife and injure them.

C. Was passed at time when the policy was not to act on or confirm titles, and when Sec. 3 had not only not been born, but not even proposed.

See page 85 as to text of what was adopted May 8 (p. 85).

This left canal company out in the cold.

SENATOR HOAR (pp. 85, 86) then enters the arena for the canal company (Debates, pp. 86, 87).

His amendments (p. 86).

Its sole purpose and effect were declared to be to protect the canal company (pp. 87, 93).

Spooner's amendment had only one general opponent, Senator CALL, of Florida.

SENATOR DOLPH opposed it because it left out canal company (pp. 26-28).

SENATOR PALMER did not oppose the principle of the Spooner amendment, but wished the settlers protected.

His two amendments (Debates, p. 35).

First amendment adopted (Debates, p. 84).

Second amendment withdrawn and substitute offered (Debates, p. 47). Voted down (p. 84).

Spooner's amendment adopted (p. 84).

RESULT was that Spooner got private entries confirmed subject to pre-emption and homestead rights existing May 1, 1888.

SPOONER'S AMENDMENT TO BILL No. 1,430 (p. 14) was debated May 3d (pp. 15–33); May 7th (pp. 15–56); May 8th (pp. 56–105); May 9th (pp. 105–120); May 10th (pp. 120–122), when it passed Senate (p. 122).

SPOONER AMENDMENT, page 14:

He represented interests of private entrymen—a large interest, identical with canal company—the same technical objection (both in Michigan) applying to both, 51,600 odd sections sold by United States, 78,200 even sections sold by United States; 1,200 persons interested (Debates [Spooner], p. 50). This amendment became Section 3, Act March 2, 1889, with Hoar's amendments thereto, for avowed benefit of canal company, against Palmer's opposition, and with Palmer's amendments thereto for the benefit of settlers.

THE DEBATES, May 8, 9, 10 (from pp. 85–122), occupied ALONE with the question whether the canal selections should be confirmed, and yet they say the canal company not in it!

SENATOR PALMER fought Hoar's amendment tooth and nail because it confirmed canal grants (Debates, pp. 88, 119).

SENATOR STOCKBRIDGE was in favor of canal confirmation (Debates, pp. 98, 99).

Nothing else but canal company's rights debated.

SENATOR TELLER supports Hoar (Debates, pp. 93, 94, 100).

SENATOR GEORGE supports Hoar (Debates, pp. 107, 108).

HISTORY OF THE WORDS "*or under State selections in Michigan confirmed by the Secretary of the Interior*" (Debates, pp. 85, 86, 87, 88, 93, 98, 99, 101).

Apt words—"*State selections confirmed by the Secretary of the Interior*" apt words to describe canal lands.

Canal Act, 1865, "granted 200,000 acres" to the State, "to be *selected* by an agent or agents appointed by the Governor of said State, subject to the approval of the Secretary of the Interior."

Canal Act, 1866: "Said lands shall be *selected*," &c.

No mention made in any of the debates of any "State selections" except canal selections (see Debates, *passim*).

HISTORY OF WORDS "*or any tract in such State selection*" (Debates, pp. 108, 109, 113, 121, 122).

These words put in expressly because the canal company's title was neither a sale nor entry (Debates, pp. 108, 109, 113).

Final passage (Debates, pp. 118, 119, 120, 121, 122).

Second conference report March 2, 1889 (Debates, p. 139).

SENATOR PLUMB'S statement in Senate (Debates, p. 141).

MR. ALLEN'S in House (Debates, p. 142).

PROCEEDINGS AND DEBATES IN CONGRESS

(EXTRACTED FROM THE "CONGRESSIONAL RECORD")

ON THE

RAILROAD LAND GRANT FORFEITURE BILL,

AND THE

CONFIRMATION OF "STATE SELECTIONS" BY THE ACT OF CONGRESS OF MARCH 2, 1889,

(25 Stats. at Large, p. 1008.)

MAY 2D, 1888. Senate Bill 1430, for the forfeiture of railroad land grants generally, opposite the uncompleted portions of the lines of roads, for which the grants were made, was under consideration in the Senate.

Senator DAWES offered the following amendment:

"*Provided, further*, That this Act shall not be considered to impair any rights, legal or equitable, now vested in any person or corporation, to any of the lands herein perfected."

Mr. BERRY. * * * I suppose the Senator's object is to say that it shall not affect the title of a different corporation, a certain canal company that claims equitable rights in certain lands in Michigan.

Mr. DAWES. That is the object of it.

After considerable debate for and against the amendment, Senator Palmer strongly opposing it, the amendment was withdrawn, and the following proceedings were had (Cong. Record, May 3d, 1888, p. 3808):

Mr. HOAR. I have drawn an amendment which I have submitted to the Senator from Michigan, and which he prefers a little to the one which is proposed by my colleague, and it seems to me that it will answer what I understand to be the professed desire of both sides to this controversy.

As I understand the chairman of the Committee on Public Lands and the gentlemen who have discussed this question, they say that what they want to do by this bill is to make a general declaration of forfeiture of all unearned railroad grants, and that they do not want to go at this time into the question whether this, that, or the other railroad or person claiming under this, that, or the other railroad has got an equity which we ought to respect, but to let all such parties come to Congress hereafter if they require legislation, or let them go to the courts and present their case if they have a good legal title now, one which the courts may enforce.

That being the purpose, it seems to me—and I have submitted it to my colleague and others—that this bill as it is framed goes further than that, and that when these grantees come to Congress hereafter they will be met with the answer, "Why, Congress had that all up before them when this forfeiture bill was passed, and they determined that they would not make you an exception to any general forfeiture. Your question has been settled, and we will not reopen it." I suppose the honorable Senator from Kansas would agree that that would not be a fair result from this legislation to-day.

The PRESIDING OFFICER. The Senator from Massachusetts will suspend. The morning hour having expired, the Chair lays before the Senate the regular order.

Mr. HOAR. I ask unanimous consent to complete this statement.

The PRESIDING OFFICER. The Chair will lay the regular order before the Senate.

The CHIEF CLERK. A bill (S. 2083) to provide for

the establishment of a Bureau of Animal Industry, and to facilitate the exportation of live-stock and their products, to extirpate contagious pleuropneumonia and other diseases among domestic animals, and for other purposes.

Mr. HOAR. Now, if I may be permitted by unanimous consent to complete my statement——

The PRESIDING OFFICER. Is there unanimous consent to the Senator from Massachusetts proceeding? The Chair hears no objection.

Mr. HOAR. To this amendment to the land bill the Senator from Michigan expresses his assent, and I desire to read it to the Senator from Kansas, and if I can get the assent of the Senator from Kansas it will save all trouble. It is in reference to this single canal company:

Provided, That this act shall not be construed to prejudice any right of the Portage Lake Canal Company or any person claiming under them who applies hereafter to the courts or to Congress for any legal or equitable relief to which they may be now entitled.

I can not see that I give any human being an advantage.

MAY 3D, 1888. The same bill being under consideration in the Senate, the following proceedings were had in relation to the proposed amendment (Cong. Record, May 4th, 1888, pp. 3857–3859):

Mr. HOAR. I offered an amendment the other day which was pending, I think, when the bill was last under consideration. I will withdraw that amendment. The Senator from Michigan [Mr. PALMER] has an amendment to offer which includes that amendment with some modifications, and I therefore withdraw it.

The PRESIDENT *pro tempore*. The amendment proposed by the Senator from Massachusetts is withdrawn.

Mr. PALMER. I offer an amendment as a substitute for the one withdrawn by the Senator from Massachusetts, to come in at the same place in the bill indicated for his amendment.

Mr. HOAR. At the end of the bill.

The PRESIDENT *pro tempore*. The Secretary will read the amendment.

The CHIEF CLERK. It is proposed to add the following proviso:

Provided, That this act shall not be construed to prejudice any right of the Portage Lake Canal Company or the Ontonagon and Brulé River Railroad Company, or any person claiming under them, to apply hereafter to the courts or to Congress for any legal or equitable relief to which they may be now entitled, nor to prejudice any right of forfeiture or recovery of the United States in respect of any of the lands claimed by said companies, nor to the prejudice of the right of any person claiming adversely to said companies or their assigns under the laws of the United States.

The PRESIDING OFFICER (Mr. HARRIS in the chair). The question is, Will the Senate agree to the amendment of the Senator from Michigan?

Mr. PLUMB. I should like to ask the Senator from Michigan where he intends the amendment to come in.

Mr. PALMER. In the place indicated by the Senator from Massachusetts for his amendment. It is his amendment modified. I think that amendment was to come in at the end of the bill.

Mr. BERRY. I should like to ask the Senator from Michigan why he proposes to insert the Ontonagon and Brulé Railroad Company. The object of the bill is to forfeit the right of all these railroad companies to the lands opposite the uncompleted part of the roads. Why does he propose to insert a provision that the bill shall not prejudice the right of one of those companies to lands which I understand it is the purpose of the bill to forfeit?

Mr. PALMER. I understand that the purpose of the bill is to forfeit the unearned lands opposite the uncompleted portion, and this is merely put in to reserve any legal rights that the company may have. I should not have offered it if the amendment of the Senator from Massachusetts had not been offered; but under the circumstances I thought it was well to reserve the rights of the Ontonagon and Brulé Railroad Company, which has had a very hard time, and has lost a great deal of money, so as to give it all the rights it has

under the law. That is to be determined by the courts as a matter of course.

Mr. BERRY. So far as the amendment provides that the bill shall not prejudice the rights of any person whatever claiming under the canal company, or the settlers, or any other claim of that character, I can see no objection to it; but the object of the bill is to forfeit all lands opposite the uncompleted portions of the railroads throughout the United States, and I am certainly opposed to excepting any lands where the road has not been completed at the time of the passage of the bill.

I therefore move to strike out of the amendment the words "or the Ontonagon and Brulé River Railroad Company."

Mr. HOAR. This part of the amendment was not put in on my suggestion. That came from the Senator from Michigan. What I endeavored to do in drawing the amendment was to put into shape exactly what the Senator from Arkansas himself said yesterday, and has said a great many times; and everything that he says, as we all know, is said with considerable knowledge of this subject as well as with absolute sincerity, because he is on the committee and has investigated the matter a great deal more than I have. The Senator from Kansas, the chairman of the committee, the Senator from Michigan, and all have said the same thing, that they propose to forfeit these titles to revest them in the United States, but that if anybody had any special reason why Congress should be asked to except them, or to recognize some equitable or legal rights that they claim, they did not think this was the time to go into all those numerous questions over the country, but let the people come by and by before the committees and see what rights they could establish.

That I understand is the policy of the committee, and being the policy of the committee my desire was that the bill should so pass that if anybody came hereafter and went before the Committee on Public Lands and said, "We have a claim which Congress in its sense of justice and equity ought to recognize and do something for us," the committee should not feel obliged by the phraseology of this bill to turn around to them and say, "That was all considered in 1888; Congress meant to determine and adjudge that question; we do not want to hear you any more."

Therefore I drew the amendment referring only to

those interested in my State, so that if they had any legal or equitable right which they had now, this measure should not prejudice their title to come to Congress hereafter and ask relief, or to go to the courts. That is the whole of it as I drew it. Now, the Senator from Michigan desires to put in this provision in regard to other companies, which of course is equally just, and I have no objection to it.

Mr. PLUMB. I have examined the amendment. I think it ought to be proposed as a proviso to section 4.

I wish to say to the Senator from Arkansas [Mr. BERRY] that I do not think the amendment really changes the purport or effect of the bill in the slightest particular. It simply says that it shall not interfere with the right of the company to go into the courts or to come to Congress, and it is a right that Congress can not practically take away anyhow. I believe the effect of the amendment is to leave the bill exactly as it was when it came from the committee. Therefore, while I think it is idle, at the same time, inasmuch as the Senators who are interested on the various sides of this question are satisfied with it, so far as I am concerned I am willing that it shall be adopted.

Mr. BERRY. Will the Senator from Kansas allow me to ask him a question?

Mr. PLUMB. I will.

Mr. BERRY. Will not the amendment have the effect, if the Ontonagon and Brulé Railroad Company finish their road hereafter, to give them a right to the lands along that portion of it now uncompleted?

Mr. PLUMB. Not at all. It does not impair or qualify the forfeiture of the first section in any way whatever, as I think.

Mr. BERRY. I can see no necessity and no reason why one railroad company should be specially named when the amendment as proposed by the Senator from Massachusetts included every person who has now a legal or equitable right. To that I have no objection, because the bill proposed all the time, and the committee has intended all the time, to give them all their rights, such as they are. To that I have no objection, but I do object to selecting one railroad company and saying that the bill shall not affect its rights when the object of the bill is to forfeit the rights of all railroad companies throughout the United States to unearned lands.

Mr. PLUMB. Let me read the amendment, and I

think the Senator from Arkansas will see that my construction of it is correct:

Provided, That this act shall not be construed to prejudice any right of the Portage Lake Canal Company, or the Ontonagon and Brulé River Railroad Company—

If it stopped there, of course it would be amenable to the objections of the Senator from Arkansas—

or any person claiming under them, to apply hereafter to the courts or to Congress—

I think that is absolutely, so far as the legal effect is concerned, so much waste paper—

from [for] any legal or equitable relief to which they may be now entitled.

It limits them to just two things. They can apply to Congress or to the courts for that relief, and I do not think we can cut them out from either.

Mr. PALMER. I understand that the amendment does not alter the purpose of the bill at all. I think it is just so much verbiage, but as long as one company was going to be specified, I thought it well enough to specify another. I am perfectly willing to have the bill pass without the amendment or with it. The Senator from Massachusetts desires to have it in, and I can see no harm in inserting it in the bill.

The PRESIDING OFFICER. Does the Senator from Arkansas insist on his amendment to the amendment?

Mr. BERRY. Yes, sir.

Mr. CALL. Mr. President, it seems to me that this method of legislation is subject to a very serious criticism and to a very grave objection. For Congress to declare that an equitable right as against an act of forfeiture is reserved and unaffected by the act of forfeiture is in itself contradictory. There can be no equity against the exercise of the sovereign power of forfeiture exercised by Congress. When there is the exercise of legislative power to do a certain thing, if it has that power and it is exercised, there is an end of it; the law effectuates itself.

The equity that exists against that is a matter that

is referable to the discretion of Congress alone, and it seems to me if the friends of the canal company desire Congress, in consideration of certain circumstances which to them seem equitable, to interpose for its relief, it should be done by a bill distinctly presenting that question and excepting this company from the act of forfeiture.

To say that the act of forfeiture should apply to the canal company or to the railroad company, but that all legal and equitable rights shall be reserved, is, as said by the Senator from Kansas, the affirmation of something that is impossible, except that it may be considered to mean that Congress considers in this act of legislation that there is an equity, and that it creates an equity and empowers the courts to substitute the judicial discretion for the sovereign discretion of the legislature.

I am opposed to all that method of legislation which gives to judicial tribunals the legislative power belonging to the representatives of the people and to the States. There can be no equity against the exercise of the power of forfeiture when in the judgment of Congress it ought to be and is exercised. To say, then, that we forfeit this land and we protect the settlers under the laws of the United States upon it, but we reserve to these grantees all the legal and equitable rights which they have, is an improper manner of exercising that power, and is an exercise of it subject to limitations which may not unreasonably authorize the Courts to say, "Congress has declared there was an equity, and we so declare." In other words, it may destroy the entire operation of the act of forfeiture in regard to this property.

Mr. PLUMB. The point which the Senator from Florida makes, I think, is covered by section 4 of the bill, which is—

That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, etc.

Mr. CALL. That is true; but then this amendment expressly negatives that provision of the bill.

Mr. PLUMB. Not at all. It simply provides that these people may go into the courts as though this bill

had not been passed; and that we cannot prevent them from doing.

Mr. CALL. It goes further than that.

Mr. PLUMB. It provides that they may come to Congress; and that we can not prevent them from doing.

Mr. CALL. It goes further than that.

Mr. PLUMB. Not at all.

Mr. CALL. "For any legal or equitable relief."

Mr. PLUMB. That is to say, they may be recognized by these tribunals.

Mr. CALL. This tribunal, after having passed an act of forfeiture, can not say that there is a legal and equitable right against what they themselves have done in the exercise of power given to them.

Mr. PLUMB. Suppose these people have a legal right to go into the courts, does the Senator want to take that right away from them?

Mr. CALL. If you can not take it away from them, there is no need of the amendment.

Mr. PLUMB. Therefore, I say, in my comprehension, this amendment is absolutely without effect; but at the same time, inasmuch as it has been proposed, I do not see any objection to having it adopted.

Mr. CALL. It would not be objectionable if it did not say "legal and equitable rights." They may hereafter come to Congress and say that this forfeiture is not good which has taken place and which is declared, and that their legal and equitable rights against it are reserved in this act.

Mr. PLUMB. No, there is no reservation at all; they simply shall not be estopped from coming to Congress and asserting those rights. Any person may come to Congress for that purpose.

Mr. CALL. My friend must not mix up the two things. Anybody may come to Congress for any kind of relief he sees fit to ask; but after an act of forfeiture has been passed restoring land to the public domain, and it has been disposed of by the proper officers under the land laws, no one can come to Congress and say, "I ask that this action be reversed and that the land be given to me under a legal and equitable right which I now affirm as against that act."

Mr. PLUMB. There is no limit to the right of petition. A person may ask for anything.

Mr. CALL. That is true, but that is not the question.

Mr. PLUMB. This does not bind Congress to give anything. It simply says that it shall not cut them off from applying.

Mr. CALL. Now, let us examine that point and see whether it does or not? This act of forfeiture we will suppose to take effect according to the idea of the Senator from Kansas. It forfeits the land which this Portage Canal Company claims. That land is disposed of to settlers, or by donation under act of Congress to some one else. If the act of forfeiture is valid that vests a title in it. Then these petitioners come to Congress and file a petition and say:

By the amendment proposed by the Senator from Michigan our rights, legal and equitable, were reserved, and we had a right to come to Congress or to go to the courts, and we ask now that the consequences of this act of forfeiture in the disposal of this land by homestead entry or otherwise under the land laws of the United States shall all be reversed, and that the land shall be restored to us.

Is not that competent?

Mr. PLUMB. No, Mr. President, that brings up a question beyond the competence of Congress. If other people have a legal title to these lands Congress cannot take it away. It might happen—I do not know that it would happen; I do not think it would happen—that this company might have a claim against Congress, or somebody else might have a claim against Congress, on account of some misleading action taken by the Interior Department, and if that were so they might come and ask compensation and damages in money. There might be a variety of ways in which they might ask compensation. Congress can not take away the title, of course, and persons affected could apply, whether we put this provision in or not, because it is always in the competence of Congress to take into consideration equities of any kind whatever. Legal rights, of course, are supposed to be enforced by the courts, but Congress may take into consideration that class of equities of which the courts can not take cognizance.

Mr. CALL. The Senator, I think, is exactly right, and if you will insert in the amendment that they may

come to Congress for a pecuniary compensation for any injury to their equitable rights there would be no objection to it, except that it would be unnecessary, for they can do that any way. But the difficulty in the case is that this bill proposes to forfeit a specific portion of land. As against the exercise of that power of forfeiture which the bill itself contains, here is an amendment which says that these parties may come to Congress or go into the courts, to do what? They can not go into the courts to assert any equitable right, for there is no equity against the exercise of the sovereign power of legislation. Supposing the power to exist, there can be no equity except such as the discretion of the sovereign sees fit to create.

Mr. PLUMB. This does not limit that power at all.

Mr. CALL. If it is not to be construed as saving their equitable right to the land, if it is not to be construed as creating an equity by act of legislation which does not exist, it does not limit it; but if it does, and the language so purports, and that can be the only intention in offering it, it must be, as the Senator from Kansas says, utterly void, unless it limits and qualifies the exercise of the power of forfeiture which the act purports to make.

Mr. PLUMB. It is a reservation in favor of individuals, substantially in terms the reservation in favor of the Government contained in the fourth section of the bill, which I will now read:

That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other land granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant.

Then the amendment simply goes on to say, nor shall this interfere with any right—not conferring any right, legal or equitable, upon the parties named in the amendment to come to Congress or to go to the courts; in other words, whatever the *status quo* may be, to simply leave it; that is all. It does not confer any right; it does not say there is any right; it simply says, if there is any right this shall not cut out those holding it from applying to the courts or to Congress for the purpose of having it recognized. That is all

there is about it. That is exactly what the bill is intended to do.

The matter was discussed in the committee. The intention was in regard to all this class of controverted questions, about which the Senate has heard so much recently, that Congress should not interfere with cases in which it might perhaps do injustice, but at all events of which it was not thoroughly informed.

Mr. REAGAN. Mr. President, I understand that this action is rendered necessary because the courts have determined that this land can not be forfeited without the action of the political authority, as under the peculiar legislation the courts can not declare a forfeiture. This bill purposes to do by the political authority what under other circumstances would be done by judicial authority. If railroad companies have rights which the judiciary can not forfeit, and that reservation is made, does it not follow that the roads will not come under the provisions of the act.

Mr. PLUMB. No, not at all.

Mr. CALL. Mr. President, this question presents itself in two aspects. The first is, is there any land contained in this grant which ought to be subject to the power of forfeiture by the Congress of the United States? That is one question. Ought this land to be forfeited or not? Is there any ground of law or equity which should retain the sovereign power of the people from dedicating this land to the general use in homestead settlement or entry? If there is, it should be distinctly recognized and so declared by Congress, because the exercise of this power of legislation is final and conclusive and imperative as law. There can be no equity, except that which Congress creates against the exercise of any power of legislation. Now, if you say when exercising a sovereign power of legislation, "there is hereby reserved the equitable right of any individual," how is it to be ascertained? Here sits the judge to say: "Congress has passed a law, has exercised its sovereign power of legislation; we declare that there is an equity which should have restrained and which shall restrain the Congress of the United States from the exercise of its power."

Why, Mr. President, that is not correct reasoning. There can be no restraining power as against the sovereign legislature exercising its power; otherwise it is not sovereign and it is not legislation.

There can be no equity. This amendment says it

shall not affect any equity against the exercise of this power. That is not a proper form in which we should place ourselves. If these parties should have this land it should be so said in terms; if not, it should be forfeited. If the courts should decide the question of legal right, we should leave it to them in express terms; but to say that we forfeit the land but reserve the equitable rights of the company named or anybody else who may assert a title seems to be absurd. Congress can not do it. It is out of its power. All this is subject to the exercise of the power of Congress. Whether it ought to be so or not, is another and a distinct question; but I think we place ourselves in a very improper light when we say "we forfeit this," and yet we do not forfeit it, but we reserve to all parties claiming any legal or equitable right they may have.

The PRESIDING OFFICER. The question is on the amendment proposed by the Senator from Arkansas [Mr. BERRY] to the amendment of the Senator from Michigan [Mr. PALMER].

Mr. PLUMB. I call for the yeas and nays.

The yeas and nays were ordered.

Mr. COCKRELL. Let the amendment be read.

The PRESIDING OFFICER. It will be read.

The SECRETARY. After the word "company," in line 4, it is proposed to strike out "or the Ontonagon and Brulé River Railroad Company," so as to read:

Provided, That this act shall not be construed to prejudice any right of the Portage Lake Canal Company, or any person claiming under them, etc.

Mr. PALMER. I hope that the motion of the Senator from Arkansas will not prevail. I think that if we are going to make any declaration in favor of one company we should in favor of the other. I do not think the amendment amounts to anything. It is merely explanatory or declaratory of what is the manifest purpose of the bill, but as long as it is going to be adopted I do not wish the canal company to be favored as against the Ontonagon and Brulé River Railroad Company. I have heretofore introduced a bill to forfeit the grant of the Ontonagon and Brulé Railroad Company, but at the same time they are entitled to some consideration, for they have had a very hard time, and if we can, con-

sistently with our duty to the public, relieve the burden that they bear, I think we should do so.

Mr. BERRY. I want to forfeit the grant to the railroad company. The bill is to forfeit the railroad grants, and I would not vote a foot of land to any railroad company in the United States.

Mr. PALMER. I have not got the phobia quite as bad as that. I believe in declaring the unearned grants forfeited, but I believe in giving the railroads fair play. I think that we erred by going to the other extreme hitherto, and now we are liable to err by following the oscillations of the pendulum a little too far the other way. I believe in fair play to the railroads as well as to individuals and to the public.

The amendment to the amendment was rejected, and the amendment as offered by Senator Palmer was agreed to (p. 3859), and the Senate proceeded to the further consideration of the bill as follows (Cong. Record, May 4th, 1888, pp. 3859–3863):

Mr. PLUMB. I understand that is a proviso to section 4.

The PRESIDING OFFICER. It is a proviso to come in at the end of section 4.

Mr. SPOONER. I offer the amendment which I send to the desk to come in as an additional section to the bill.

The amendment was read, as follows:

SEC. 9. That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States, by sales or entries, by cash warrants or scrip, under color of the public-land laws, and where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: *Provided, however*, That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of

such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States.

The PRESIDING OFFICER (Mr. HARRIS in the chair). The question is on the amendment of the Senator from Wisconsin [Mr. SPOONER].

Mr. PALMER. There are two amendments offered by me to the amendment of the Senator from Wisconsin which may be embodied in one, and can be appended to line 16. They are printed on the same sheet. Let the Secretary embody both of these amendments in one. I now offer them.

The PRESIDING OFFICER. The Secretary will report the amendment of the Senator from Michigan to the amendment offered by the Senator from Wisconsin.

The SECRETARY. At the end of the amendment of Mr. SPOONER it is proposed to add:

Nothing herein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of January, 1888, arising or asserted under color of the laws of the United States.

Mr. SPOONER. I accept that amendment.

The PRESIDING OFFICER. The Senator from Wisconsin modifies his amendment as just read by the Secretary.

Mr. PALMER. There is another amendment of mine. I see that the Senator from Wisconsin may object to the second, and therefore it can not be embodied in the first.

The PRESIDING OFFICER. It is now in order. The Senator from Wisconsin has modified his former amendment. Now the Senator from Michigan can offer his amendment.

Mr. PALMER. I now offer my second amendment.

The PRESIDING OFFICER. It will be read.

The SECRETARY. It is proposed to add to the amendment of Mr. SPOONER the following words:

And no sale or entries shall be hereby confirmed to the prejudice of any pre-emption or homestead claims now valid under existing decisions of the Secretary of

the Interior, and which were existing on the 1st day of January, 1888.

Mr. COCKRELL. Is that amendment subject to amendment?

The PRESIDING OFFICER. This is an amendment in the second degree.

Mr. COCKRELL. Would it be in order to move to strike out certain words in that amendment?

The PRESIDING OFFICER. That would be an amendment in the third degree, which would not be in order.

Mr. COCKRELL. Was not the amendment of the Senator from Wisconsin adopted?

The PRESIDING OFFICER. The amendment of the Senator from Wisconsin is pending, to which the Senator from Michigan has now offered an amendment.

Mr. COCKRELL. I suggest to the Senator from Michigan that he modify his amendment by striking out the words "under existing decisions of the Secretary of the Interior" and inserting in lieu thereof the words "under the existing laws of the United States." I do not think it would be very appropriate legislation to put in "under existing decisions of the Secretary of the Interior" without knowing what those decisions are.

Mr. PLUMB. I would suggest to say "now valid under existing law."

Mr. COCKRELL. That is what I mean—under existing law.

Mr. PALMER. I should prefer to have it just as it is. There are certain rights which have been established or decided upon in the Interior Department which the homesteaders of our State have been prosecuting for seven or eight years. The decision was given in the case of Wakefield *vs.* Cutter to the effect that cash purchasers on the common land, as it was called, have no rights whatever. That decision has been made by the Secretary of the Interior, and the very gist of the whole amendment is in those words that the Senator from Missouri suggests should be stricken out. They do not wish to be relegated to the old fight; I do not suppose that the Secretary of the Interior is the court of last resort; but they do not want to have this fight to go over again. They are poor men. They have with their little dimes and half dollars kept counsel here to

protect their interests. One has been sent down here now, and has been here all winter, watching this bill. What they desire is that they shall lose no ground that they have obtained. Under these circumstances I hope the amendment will be adopted as I have offered it, without qualification.

Mr. SPOONER. The amendment which the Senator from Michigan last offered, as explained by him, has the effect to render of no avail, if adopted, the amendment to which it is an amendment. The amendment which I have sent to the desk is an amendment which applies to the transactions of six or seven hundred citizens of the United States with the Government of the United States through the officers of the United States simply those principles of common honesty and fair dealing which obtain among honest men dealing with each other.

By a mistake as to the law, a confessed mistake, but a mistake for which the officers of the Government were as much responsible as those who dealt with them, during the period of eight years portions of these lands were held open to entry and sale in the State of Michigan, and during that time and all of that time the Government officers, acting in good faith, dealing with citizens of the United States also acting in good faith, sold these lands to purchasers, taking the money from them and putting it in the Treasury, where it is to-day, accepting from them land-warrants and canceling them as having performed their function, accepting from them at the land offices scrip with the function of location annexed. My amendment is a proposition simply that as to those persons who purchased in good faith, the purchase money being still retained by the Government, the title shall be confirmed.

Their entries were void, I concede, for the purposes of the argument, technically, because the act of Congress required that the lands should be reoffered. They were restored to market. They were proclaimed restored by the President of the United States and were advertised for sale, and from 1866 until 1874 they were as open to entry in the land offices, so far as the world knew and so far as the action of the Government was concerned, as any public land in the United States.

At the last session of Congress an act was passed providing for the adjustment of land grants which declared, I think justly declared, that wherever persons had purchased in good faith from a railway company

they should be permitted, notwithstanding the failure of the railway company's title, to pay the purchase-money to the United States and protect their title. This very bill, in its second section, fairly and justly provides that wherever any of the lands which are forfeited by the provisions of the bill shall have been purchased in good faith by citizens of the United States and are in their possession they shall have the right to protect that title by paying the purchase-money to the Government. That is a just and right provision. But why protect the titles of those who have bought in good faith from railroad companies throughout the country, and yet refuse to protect the titles of those who have purchased in good faith from the Government itself?

Mr. COCKRELL. I should like to ask the Senator a question in regard to those lands about which he is speaking now. As I understand, the defect is that the United States officers failed or neglected to advertise and offer those lands for public sale?

Mr. SPOONER. They advertised, but they were not technically offered, except as to a small quantity.

Mr. COCKRELL. It was advertised that they would be sold at public sale.

Mr. SPOONER. Yes, sir.

Mr. COCKRELL. But on that day the formal offering was not made.

Mr. SPOONER. There was an offer of a few tracts in fact, as I understand it, but the whole body was not offered for sale.

Mr. PALMER. Will the Senator excuse me? I think that these lands were never advertised or offered at public sale.

Mr. SPOONER. I have a copy of the advertisement.

Mr. PALMER. I may be in error.

Mr. COCKRELL. They were then in the market how long?

Mr. SPOONER. Eight years.

Mr. COCKRELL. When were these entries made?

Mr. SPOONER. These entries were made during that time.

Mr. COCKRELL. Were they all made right at once?

Mr. SPOONER. No; they were made during those years.

Mr. SAWYER. I will answer that. They were principally made during a period of four years.

Mr. COCKRELL. Were all the lands taken up?

Mr. SPOONER. No, sir.

Mr. COCKRELL. In what proportion?

Mr. SPOONER. There were about 700 purchasers, I understand, altogether.

Mr. COCKRELL. How much did each one purchase?

Mr. SPOONER. I do not know.

Mr. COCKRELL. How much was taken up in the aggregate?

Mr. SPOONER. I do not know that

Mr. SAWYER. I think there were altogether 100,000 acres, but there were very few lands sold until after they had been in the market from four to five years. They were all advertised. I know that, because I saw the advertisement in the papers at the time, but they were not put up at public auction.

Mr. COCKRELL. They were then treated by the land offices as subject to disposition to any one who applied?

Mr. SAWYER. That is it.

Mr. COCKRELL. By cash, land warrant, or entry?

Mr. SPOONER. That is the point. There is a technical defect in the title, and probably a fatal defect in the title if Congress chooses to insist upon it; but the land officers, undoubtedly acting in good faith, opened the lands to purchase, and during those years from time to time, and at different times, these entries were made, and the locations were made.

Mr. COCKRELL. Were they made by individuals or by corporations?

Mr. SPOONER. By individuals mostly, as I understand it, residing in different States—some of them in Wisconsin, some of them in Michigan, some of them in Illinois. The Government has issued patents on a large portion of them. On others the land officers' receipts only were issued. These purchasers have paid taxes on the land for years as their property. The lands have been subject to mortgage; they have been subject to sale under warranty deeds by the individual purchasers, and they have been subject to sale upon execution. They have been treated, in other words, by the Government of the United States, by the purchasers of the lands, and by the State in the exercise of her taxing power, as having been acquired in good faith and as belonging to these purchasers.

There was at one time some suggestion of fraud in connection with some of them, but I have provided in the amendment that it shall be operative to confirm these titles where the lands are now owned by the original entrymen only in those cases where the

Secretary of the Interior shall be satisfied that their purchases were without fraud and in the belief that they were thereby obtaining a valid title from the United States.

It is not a new policy for the Government to protect purchasers in good faith. Repeatedly such acts have been passed. Congress provided, as I have stated, at the last session, and this very bill provides, for protecting purchasers from the railway companies whose lands were forfeited under these grants, because they acted in good faith, and it would be impossible——

Mr. COCKRELL. Let me ask the Senator if he can not extend that provision to assignees or vendees where they have not purchased in good faith?

Mr. SPOONER. I did not draw the amendment to extend to assignees of original purchasers for this reason: It seemed to me that where a patent had been issued by the Government of the United States to a purchaser, which we all recognize as the highest possible muniment of title, and individuals had purchased upon the strength of that title, the Government not moving now for fourteen, fifteen, or sixteen years to assert any defect; it would be unjust to extend the condition to the vendees.

Mr. COCKRELL. You are right now; but the question would be as to cases where the patent had not been issued.

Mr. SPOONER. I would have no objection to that limitation.

Now, as to the proposition of the Senator from Michigan. While protecting the rights of bona fide purchasers from the United States, and confessing their need of confirmatory action, admitting that the title is technically invalid, I have no desire that these titles shall be confirmed as against any bona fide homesteader or pre-emption claimant on any of these lands, and therefore I accepted the amendment offered first by the Senator from Michigan, declaring that this act should not confirm the title of any purchaser as against any bona fide settler, pre-emptioner, or homesteader existing on the 1st day of February, 1888.

Now, the Senator asks the Senate by his second amendment—and I think the objection taken to it by the Senator from Missouri is well taken—to legalize, beyond the reach of the courts even, some decision or

decisions of the Secretary of the Interior holding cash entries to have been void. We all know they were void as against the United States. They were void upon this technical ground, that the lands had not been formally reoffered. It is because they were so defective that these purchasers invoke this measure of justice and protection from the United States; but they do not ask that it shall be granted as against any bona fide pre-emption claimant or homesteader.

Mr. PALMER. Does the Senator understand that the cash entries are void on all these lands proposed to be forfeited in Michigan?

Mr. SPOONER. Only the odd-numbered sections.

Mr. PALMER. In all the grants?

Mr. SPOONER. In the odd-numbered sections.

Mr. PALMER. I think that is confined to the common land. I do not think they went to any other than the common land.

Mr. SPOONER. Wherever in the State of Michigan within the limits of the land grants made by the act of June 3, 1856, odd-numbered sections were sold after 1866 and down to 1875, without having been first offered technically at public sale, the title is defective, as I understand it.

Mr. CALL. I ask the Senator, was that the ground taken by the Secretary?

Mr. SPOONER. I suppose it was. I do not know anything about that decision, but it would not require a decision of the Secretary nor would it require a decision other than that which the Supreme Court of the United States has already made to make that the law. The Supreme Court held in the case of Eldred *vs.* Sexton, 19 Wall., 189, many years ago, what no lawyer ever could fairly doubt, that where the law required that the public lands should be reoffered at public sale before being subject to private entry, if they were sold without that conditions precedent the entry would be invalid.

Mr. CALL. I only wished to know if there was any other ground.

Mr. SPOONER. Not that I know of.

Now, sir, I want and I ask that these purchasers in good faith shall be protected except where their title conflicts with any bona fide settler or homesteader down to 1888. Wherever there is any such conflict the cash entryman must yield to the interest and right of the settler. But when the Senator from Michigan

goes beyond that and asks Congress to give these men or any men more than they are entitled to under the laws of the United States he asks too much.

The decisions of the Secretary of the Interior may be right; they may be wrong. They are not entitled to the presumption of correctness that a decision of the Supreme Court of the United States would be. They are sometimes changed by different Secretaries, and I do not think it would be good policy or good legislation to legalize and make a rule of law by enactment of any decision of a head of a Department, no matter who he may be. If his decision is the law, it will stand. If his decision is not the law, then Congress should not declare it to be the law. The Senator from Michigan, it seems to me, ought to be entirely satisfied with an amendment which protects the rights of every bona fide settler in Michigan upon these lands under the laws of the United States as they have been declared and may hereafter be declared by the Secretary of the Interior or ultimately by the courts.

I will go as far as he in protecting the right against cash entrymen and every one else of any bona fide settler or homesteader under the laws of the United States. No man, it seems to me, can fairly ask more than that.

Mr. CALL. Who was it entered these lands? Were they generally farmers or speculators?

Mr. SPOONER. I think a large portion of this land was not agricultural land. I suppose the land was entered by men interested in lumbering operations for the pine that was upon it.

Mr. CALL. Were they entered in large bodies or small?

Mr. SPOONER. I do not know. I am told there were about seven hundred purchasers. Many of the purchasers reside in Wisconsin. Some of them I know, and I know them to be reputable men, men of integrity.

Mr. BERRY. Will the Senator allow me to ask a question?

Mr. SPOONER. Certainly.

Mr. BERRY. Suppose the amendment of the Senator from Wisconsin be adopted, in case this land was purchased at private sale and since the purchase settlers in good faith settled there with a view to homestead, would not the adoption of the amendment give the cash entryman an advantage over that settler?

Mr. SPOONER. Not in the slightest degree.

Mr. BERRY. Does it not confirm the cash entry if made prior to the time of the homestead entry?

Mr. SPOONER. My amendment expressly declares, with the amendment which I have accepted, that it shall confirm the title of the cash entryman, but not as against any bona fide settler up to 1888.

Mr. BERRY. May I ask, then, the difference between your proposition and that of the Senator from Michigan?

Mr. SPOONER. The difference between the Senator from Michigan and myself is this: I have accepted an amendment to my amendment guarding and protecting the bona fide claims of settlers and homesteaders down to January 1, 1888, under the laws of the United States.

Mr. PALMER. Will the Senator permit me to state what the difference is?

Mr. SPOONER. I think I can state it.

Mr. PALMER. Possibly from my standpoint it might look a little different.

Mr. SPOONER. I think I can state it, and if I cannot I will call the Senator from Michigan to my assistance.

The difference between the Senator from Michigan and myself is this. I having accepted his amendment protecting the bona fide claimants down to January 1, 1888, under the laws of the United States, the Senator from Michigan offers an amendment beyond that, legalizing the existing decisions of the Secretary of the Interior, whatever they may be. It is a proposition to make a law by act of Congress of existing decisions of the Secretary of the Interior. That I object to.

Mr. BERRY. May I ask the Senator, if the intention is to give preference to the cash entryman, why should he object to confirming to him directly?

Mr. SPOONER. One Secretary of the Interior may have decided homestead settlements to be bona fide and valid which another Secretary of the Interior or which a court might hold to be void. I do not want to take away from any homesteader any right which he has under the decision if the decision is good law. All I desire is that he shall be protected in every right which he has in good faith under the laws of the United States.

Mr. BERRY. But you are willing to extend that to cash entrymen without regard to the laws of the United

States which you are unwilling to give to bona fide settlers.

Mr. SPOONER. I am not unwilling to give it to bona fide settlers. The amendment which I have offered distinctly and unqualifiedly gives it to bona fide settlers; but if there shall have been an erroneous decision by the Secretary of the Interior—I do not know that there has been—a decision giving to claimants who have not in fact bona fide rights in these lands as against the bona fide purchaser from the United States, I do not want the Congress of the United States to make by act that decision a law. No man has a right to claim more or further protection than that. If he has acted in good faith, his rights thereby acquired under the laws of the United States, without regard to these bona fide cash purchasers, should be protected.

The trouble is that this amendment looks as if it were drawn by some lawyer familiar with some specific decision of the Secretary of the Interior, of the correctness of which he is not certain, and which he wants the Congress of the United States to crystallize into an act. I think any Senator here would hesitate very much to declare any particular decision of a court by act of Congress to be the law, so that courts hereafter could not change it, or would feel constrained in the exercise of judicial judgment as to the power to change it.

It is not good legislative policy on the part of the United States. And no honest homesteader, no honest settler, can ask for more than that the Congress of the United States shall declare in this bill that nothing herein contained shall operate to his prejudice. That, the amendment to the amendment, offered by the Senator from Michigan and accepted by me, clearly covers. Beyond that I think he asks the Senate to do what would not be right. He states fully and frankly that the Secretary of the Interior has decided that these cash entries were void, and he wants the Congress of the United States to declare, even where they do not conflict with bona fide settlers, that that decision shall stand as the law. It is because of that decision and because I believe that such decision is correct that this legislation confirming the titles of these cash entrymen, except as to bona fide settlers and homesteaders, is required.

Mr. PALMER. Mr. President, I hardly think that the Senator from Wisconsin has stated my position fairly; he undoubtedly thought he was doing so; but my position is just this: The homesteader and the pre-emptor

and the settler ask for no legislation. The infirmity of the cash entrymen arises from the fact that after the release of the lands in 1866 the law required them to be restored to market by some executive action before they could again be subject to private entry. They were never so restored; and as was held by Secretary Schurz in Eldred *vs.* Sexton, and by Secretary Lamar in Wakefield *vs.* Cutter *et al.*, all cash entries made thereon were absolutely void. This is in the nature, if the Senate will permit me to use a legal term, of *res adjudicata*. The thing has been passed upon; the cash entrymen have been beaten, and now they come into Congress and ask for relief.

Mr. TELLER. I should like to interrupt the Senator to say that I think he is mistaken as to the ruling of Secretary Lamar that those entries were void. I do not remember the case, but I do remember that it was decided that they were not void, but voidable at the option of the Government.

Mr. PALMER. I would say that that makes my case all the stronger. It makes the hardships much less for the cash entrymen. Their entries are merely voidable. I accept that explanation.

Mr. BERRY. Allow me a moment. I wish the record to be correct. The decision of the Secretary of the Interior was that, so far as the private entries of the even sections were concerned, they were voidable and not confirmed by the board of equitable adjudication. So far as the odd sections were concerned, the entries were absolutely void, for the reason stated in the last decision made by Mr. Lamar.

Mr. SPOONER. I am willing to admit that so far as I am concerned.

Mr. PALMER. I think the case has been stated more generously possibly to the cash entrymen by the former Secretary of the Interior. He says they are merely voidable.

Mr. SPOONER. I am willing to admit that they were void, so far as my purposes are concerned.

Mr. PALMER. That makes the case altogether better for your side.

Mr. SPOONER. Not necessarily.

Mr. PALMER. I now take the explanation of the former Secretary of the Interior that they are merely voidable. The homesteaders have fought a long and expensive fight. They have got certain rulings; they have got certain rights established. They do not ask for any

legislation. This is entirely in favor of the cash entrymen. Many of them are my friends; they are men whom I esteem very highly; but after that decision of the Supreme Court which opened these lands to the homesteader and the settler, I think we should not put them to the expense of fighting this battle over again. They went on there; they have land cleared up and homes established, and although I have no doubt that ultimately they would triumph, they want to be protected against expensive litigation. They ask no legislation. I am perfectly willing, in their behalf, to have all these amendments laid on the table.

Mr. DOLPH. Mr. President, this discussion has taken rather a curious course. There was an amendment offered by the junior Senator from Michigan [Mr. STOCKBRIDGE] which embodied all the first portion of this amendment, and also provided for the confirmation of certain State selections, and if my recollection serves me it was laid upon the table. Now we have the same old controversy, and here is a proposition to confirm the disposition of a certain portion of the lands which were granted to the State of Michigan to aid in the construction of a railroad from Ontonagon to the Wisconsin State line, and to omit to confirm a certain portion of the lands that were disposed of to the State by the General Government.

The lands disposed of were probably disposed of to pre-emption settlers, entrymen, homesteaders, settlers, who entered by warrants, it appears, and on scrip, and were sold at private entry, that is to say, cash sales. This amendment is broader, that is, it affects lands not forfeited by the bill under consideration. If the bill under consideration becomes a law, the portion of the land grant to the State of Michigan adjacent to the uncompleted road between Ontonagon and the Wisconsin State line will be forfeited. Within that line lands have been disposed of along the uncompleted road, the odd sections. Cash entries have been made. Those cash entries are illegal, first, because, the lands were not public lands at the time they were made. The fee was in the State of Michigan or in the railroad company, if there had been a transfer by the State to the company. They were also irregular or voidable, because it was held that where lands were subject to private entry before the grant was made, and then were by the Government granted to a railroad company or to the State for the purpose of aiding in the construction of a railroad, and

then forfeited and restored to the public domain, they could not be again entered at private entry until they had been reoffered at public sale. That rule applied as well to the lands between Marquette and the State line which were forfeited or properly relinquished by the State of Michigan to the General Goverment; and those cash entries within the limits of that grant in place were voidable also because the lands, after they had been relinquished to the General Government, were not again offered at public sale, and were not therefore subject to entry at private sale. Hence whoever introduced this amendment has drawn it so as to confirm the cash entries which were irregularly made within the limits of the grant which was properly relinquished to the Government by the State of Michigan.

Notwithstanding those entries may be voidable, I understand that in the main, if not altogether, they have been patented by the General Government to the parties who made the entries, and if so, according to a series of rulings by the Department of the Interior, they are beyond the jurisdiction of the Department, and since the time they were patented they never have been subject to settlement under the homestead or preemption laws, and there cannot be to-day a legal preemption or settler's claim upon them.

Now as far as I am concerned I am quite willing to confirm all these claims, although I repe t what I said the other day, that as between the 15,000 acres that were selected by the canal company and the cash entrymen, I think that the selections for the benefit of the canal company are the most meritorious, and I am not disposed, if this old question comes up again, to vote for this amendment unless it includes all those persons who have bona fide interests there. I should have much preferred the amendment offered by me, which simply provided that these lands should be treated as public lands from the time the governor of Michigan undertook to release them to the General Government, leaving the merits of all claims as between the parties and the General Government to be determined hereafter by the Interior Department and the courts; but if Congress is to confirm these claims now, I say I do not propose to be a party by my vote to confirming in part and leaving them unconfirmed in part.

In my opinion common honesty requires that the General Government and the State of Michigan, which

treated these lands as public lands, the State of Michigan which undertook by its governor to convey these lands back to the General Government and then made these selections through its agent for the canal company, and the Secretary of the Interior, who acted for the General Government, and certified these lists to the State of Michigan—I say that common honesty requires both the State and the General Government to do what was recommended by Secretary Schurz, and has been recommended by other Secretaries of the Interior, what has been recommended by the Public Land Committee of this body frequently, to treat these lands as if they had been public lands at that date; and when the time comes I shall raise the question again by moving to strike out, in line 6, "by sales or entries, by cash, warrants, or scrip," leaving the amendment to read:

When any lands relinquished to, or from any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States, under color of the public-land laws, and where the consideration received therefor is still retained by the Government—

And embrace everybody within the provision.

Mr. PALMER. I should like to ask the Senator from Oregon——

Mr. DOLPH. I yield for a question.

Mr. PALMER. I want to ask whether you are now discussing the canal amendment or this amendment of mine?

Mr. DOLPH. I am discussing the entire amendment now.

If any one supposes that where the patents have been issued to the cash entrymen there can be a valid homestead or pre-emption claim, that the lands were subject to entry, that any action of the Interior Department could breathe vitality into such a claim, and that it will be protected by the amendment by the Senator from Michigan, I think he is very much mistaken.

Mr. CALL. Will the Senator allow me to ask a question?

Mr. DOLPH. Certainly.

Mr. CALL. Suppose the Interior Department issued a patent to a part of the public domain in Oregon without any authority of law, would it confer any right?

Mr. DOLPH. No; if there was no law. If the lands did not belong to the United States, and the officer should issue a patent for the lands, it would convey no title. If there was a law that authorized these parties under any circumstances to execute a patent for these lands, and the Secretary of the Interior passed upon the fact and issued the patents, then I say that while the patents might be avoided for fraud, until they were set aside by the courts they would be a valid conveyance as between third parties.

I go further yet. Although the title may be of such a nature that the courts would say it was void and nothing passed under it, it was decided by Secretary Schurz, and has been decided by other Secretaries of the Interior, that when once a patent is issued, as for instance to swamp lands which were not swamp in fact, though the title can be set aside, the patent overcome by proof in a suit in equity that the lands are dry lands, yet wherever the patent has been issued the jurisdiction of the Interior Department is gone, and it can not offer the lands to anybody else, but the remedy must be in the courts.

I have suggested three cases in which a patent may be void or voidable, and still the jurisdiction and power of the Secretary of the Interior to dispose of the land is gone, and there can not be initiated under the rulings and law a valid adverse claim to the title which was attempted to be passed by the patent.

Mr. CALL. Then I understand the Senator to maintain that this patent, issued without authority of law by an executive officer of the United States, suspends and repeals the force and effect of the land laws authorizing the people of the United States to enter upon public lands, make their applications, and have a homestead granted; the mere fact of the issuing of a patent by an executive officer without law suspends the action of the land laws of the United States, which give to a citizen the right to enter upon the public lands, apply for a homestead, comply with the terms of the law, and obtain a patent.

Mr. DOLPH. The Senator will understand that there must be some regularity in regard to the distribution of the public lands; that after the Secretary of the Interior has once acted and issued the highest evidence of title, a patent, for him to proceed afterwards to execute a second patent, or a third patent, if he should conclude that the second one was also illegal, would

only be productive of the utmost confusion, and therefore it is held that after a patent has issued it has passed beyond the power of the administrative officers of the Government to inquire into its validity. It must be set aside, if at all, by a court of justice; and although it might be held void by a court, still it has been held—and I think it correct law—by several Secretaries of the Interior to divest of jurisdiction and power the Interior Department to make a further disposition of the land until that is disposed of.

Mr. CALL. I wish only to say that the proposition of the Senator from Oregon is entirely untenable and unreasonable. I shall not prejudice the case of my friend from Wisconsin. I am not speaking in regard to his amendment, but the proposition of the Senator from Oregon is in violation of the law; that without law an executive officer——

Mr. DOLPH. Who is to determine whether it is in violation of law?

Mr. CALL. There is only one power to determine in cases made before them the interpretation of the law as a finalty, and that is the judicial department. In other cases the executive office charged with the duty must determine the constitutionality of the law and the manner of its execution.

Mr. DOLPH. Does the Senator hold that one Secretary of the Interior can proceed to set aside a patent issued by a previous one and make a new grant of land?

Mr. CALL. Beyond all question. If a patent is issued in violation of an act of Congress or without authority of law, it is simply void. A patent is a paper issued evidencing the conveyance of an interest in land in accordance with and by virtue of an act of Congress, not otherwise; and if the Secretary of the Interior was to give me to-day a patent for all the lands in Oregon it would not be worth the paper on which it was written, and it would be the duty of the first Secretary of the Interior or other executive officer before whom it came to treat it as a mere waste piece of paper. It has no validity and no vitality, except by the action of the law and of the authority of Congress. A Secretary of the Interior is only an executive officer, having no power of concluding any person's rights, and that his acts have and can have no validity, except in so far as they are authorized by law; outside of this their opinions are only their personal opinions, and have no force or effect.

Mr. BERRY. As the reason why this consummation ought not to be made, if the Senate will indulge me, I will read the report of the committee of the House of Representatives made to the last Congress. It is very short, and it covers the entire case. It is as follows:

Notwithstanding the fact that none of these lands were, under this well-known principle of law, subject to private entry, yet a large number of such entries were allowed by the register at Marquette, covering over 88,000 acres of land within the limits of this grant alone, to say nothing of a much larger quantity outside of those limits, all of which entries were illegal and void *ab initio* under the authority cited.

It further, in respect to these entries, satisfactorily appears to your committee that they were made in violation of direct and positive instructions from the General Land Office, forbidding such disposition of the land; that these instructions were issued at intervals from 1865 to 1880; that not the slightest attention was paid to them by the local officers, who still continued to dispose of the lands at private entry, and that in this way, within the limits of the Ontonagon and State Line grant alone, there were disposed of, between 1856 and 1880, as already stated, 88,471 acres of lands, more than three-fourths of which were entered by less than thirty corporations, firms and individuals.

These figures are compiled from the pamphlet entitled "History of the Ontonagon and State Line Railroad Grant," a document prepared by the private-entry claimants themselves, and furnished the committee for use in this case.

Some of the orders, emanating from the Land Department, prohibiting these entries, read by counsel to the committee, found in their brief, with references to the official records, and uncontradicted, were as follows:

"[Commissioner to register and receiver, July 5, 1865.]

"You will not forget that all odd-numbered sections in your district, north of township 40 and west of range 21 (including the lands in contest), were withdrawn from market by order of May 26, 1865, and hence not subject to entry, location, or claim until regularly restored to market."

"[Commissioner to register and receiver, May 29, 1873.]

"It appears from your returns that you have already allowed a number of entries of these lands without authority from this office; these will be submitted to

the board for equitable adjudication, but you will not permit any further entries until the date of restoration."

"[Commissioner to register and receiver, March 1, 1879.]

"Under no circumstances will you permit any entries of any of these lands, or take any action further than herein directed, in relation thereto, until specially instructed by me."

"[Commissioner to register and receiver, August 1, 1879].

"In disregard of the above instructions, you continued to permit entries and locations to be made upon these lands, and now report them as being in conflict with tracts listed and held for restoration by my decision of 7th March last. As I am unable to account for your action in the premises, you will please report at once, giving in full the reasons for such seeming misconduct."

"[Commissioner to register and receiver, October 12, 1880.]

"By said letter of 29th May, '73, you were directed to 'permit no further entries until the date of restoration.' Your attention is invited to said letter, and you will promptly report by what authority you have allowed entries upon lands within the limits of the withdrawal made for said railroad."

No attention whatever was paid by the local officers to these repeated orders, who, as before stated, continued to dispose of these lands, and up to October 12, 1880, had permitted entries covering over 88,000 acres of land within the limits of the railroad grant alone.

During the argument of the matter before your committee it was asserted by counsel for homestead and pre-emption settlers that most of the applications to enter were filled out in the handwriting of the then register of the Marquette office, the officer to whom the various prohibitory orders were sent; that they were frequently made on top of subsisting pre-emption and homestead claims, and that the register who allowed the most of them is now a member of a "committee of land-owners," urging the passage of the confirmatory bill and signing circulars levying assessments to aid its passage, one of which was read to your committee. Some of these allegations seemed to be sustained by the proofs.

Your committee is unable to resist the conclusion, under all the facts of the case, that not only were these

private entries invalid and illegal, but that certainly, in some cases, they must have been made fraudulently and by collusion with the officers of the local land office. They are, accordingly, of opinion that an act confirming them should not be passed.

That is all I wish to present now.

MR. DOLPH. Will the Senator allow me to ask him what report that is?

MR. BERRY. That is a report made March 5, 1884, by Mr. Henley, of California, from the Committee on Public Lands. He made a subsequent report in the last Congress embodying the same ideas which I have read.

MAY 7TH, 1888. The Bill again came up for consideration in the Senate, and the following proceedings were had (Cong. Record, May 8th, 1888, pp. 3977-3981):

The PRESIDENT *pro tempore*. Senate bill 1430 will now be proceeded with.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. 1430) to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes, the pending question being on the amendment proposed by Mr. PALMER to the amendment of Mr. SPOONER.

The PRESIDENT *pro tempore*. The amendment to the amendment will be read.

The CHIEF CLERK. It is proposed to add to the amendment the following:

And no sale or entries shall be hereby confirmed to the prejudice of any pre-emption or homestead claims now valid under existing decisions of the Secretary of the Interior, and which were existing on the 1st day of January, 1888.

The PRESIDENT *pro tempore*. The question is on gareeing to the amendment to the amendment.

Mr. PALMER. Mr. President, before the vote is taken I beg leave to submit a few remarks in defense of the homesteaders and settlers in the upper peninsula of the State of Michigan.

In the debate last Thursday the Senator from Wisconsin [Mr. SPOONER] opposed my amendment on the

ground that it in some way confirms homestead claims, or ratifies a decision made in favor of such claims by the Secretary of the Interior. But my amendment does nothing of the kind. It simply exempts from the confirmation of cash entries proposed by the Senator from Wisconsin cases where both parties have been in litigation before the Department for years, and in which the Secretary has decided in favor of the settlers. If the cash entrymen want relief let them get it in the courts. When a patent is issued the opposing party may file a bill in equity to maintain any rights he may have. The Senator's amendment proposes to interfere with pending litigation in the Department by confirming the claim of the defeated party. I propose to leave the parties just as they are.

I take it that the Senate would look with abhorrence upon any proposition to step in between litigants over property rights in any forum and make a new law to decide the contest. Yet this is precisely what the rejection of my amendment would mean. These people have been for years in contest with each other in the Land Department. The Secretary has decided in favor of one side. The Senator from Wisconsin would now overturn that decision by confirming the title of the losing party. Independent of my amendment that would be the effect of his amendment. By rejecting my amendment he would render nugatory the decision of the Secretary of the Interior. That is all there is in it. I am asking no confirmation in favor of the settlers. They have themselves never asked any such thing. All they ask is to be let alone and have the protection of the law. The decisions of the courts and the Department invited them to make their homes there and they do not invoke legislation to protect them. My amendment leaves the parties just as they are. It simply declares that the Senate will not interfere in private litigation, particularly to help the losing party; in other words, that it will not pass a retroactive law to protect defeated claimants as against homesteaders and settlers.

What was said in debate on Thursday by the Senator from Wisconsin was misleading, unintentionally no doubt, on this point. It was evidently so to the Senator from Missouri [Mr. COCKRELL]. The impression conveyed was that my amendment was in the nature of a confirmation of the homestead claims. It is nothing of the kind. It simply says the homestead claims shall

not be confirmed to the cash entrymen against the decision of the courts and the Department.

I will read both my amendments, which are amendments to the amendment of the Senator from Wisconsin [Mr. SPOONER]. My amendments are these:

That nothing herein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of January, 1888, arising or asserted under color of the laws of the United States.

The second amendment reads thus:

And no sale or entries shall be hereby confirmed to the prejudice of any pre-emption or homestead claims now valid under existing decisions of the Secretary of the Interior, and which were existing on the 1st day of January, 1888.

The Senator from Wisconsin also said that my amendment prevented the confirmation of cash entries even where there were no conflicts against them. This also is a mistake. It is predicated entirely upon the existence of an adverse claim. It simply provides that no confirmation shall prejudice such an adverse claim, now valid under existing adjudications.

I have not, so far, been inclined to oppose the confirmation of cases where there are no conflicts; but before any confirmation is made the Senate ought to be fully advised of the situation. It is briefly stated:

1. The starting point is the undisputed fact that none of these lands either odd or even sections, had ever been restored to market or reoffered at public sale since the joint resolution of 1862. This fact is undisputed, and was conceded by the Senator from Wisconsin on Thursday.

2. This condition of affairs removed them from the body of lands subject to private entry. They are not subject to private entry at all. This was the decision of the Supreme Court in Eldred *vs.* Sexton, 19 Wallace, 189, some fifteen years ago, a citation from which I send to the desk to have read. We might as well have the history of this litigation. I ask the Secretary to read the passages I have marked in brackets.

The Secretary read as follows:

It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction at the price for which they are afterwards subject to entry.

They are first surveyed, then a day is appointed for their sale by the President, which is to be kept open for two weeks. At this sale they are offered at a minimum price, and can not be sold for less, but may be sold for as much more as any one will give, and what remains unsold at the close of such sale is subject to entry at that price.

There is an obvious reason for requiring a public sale before leaving the lands open to private entry. It is to secure to all persons a fair and equal opportunity of purchasing them, and to obtain for the Government the benefit of competition in case the lands should be worth more than the price fixed by Congress.

* * * * * *

Since that time the great body of the public domain has been brought into market, after proper notice, at this reduced price, and, unless Congress by special act ordered otherwise, private entries have never been allowed unless the land applied for had been previously offered at public sale to the highest bidder at the same price. This has been the established practice of the Land Office, sanctioned by the law officers of the Government, and recognized by this court as a leading feature in our system of land sales.

* * * * * *

It is true the lands in question were once offered at public sale at $2.50 an acre, but the reason of the rule required that they should be again offered to the highest bidder, because their condition as to price had been changed, and there had been no opportunity for competition at the reduced price. Congress meant nothing more than to fix $1.25 as their minimum price, and to place them in the same category with other public lands not affected by land-grant legislation. When they were withdrawn from the operation of this legislation, and their exceptional status terminated, the general provisions of the land system attached to them, and they could not, therefore, be sold at private entry until all persons had the opportunity of bidding for them at public auction.

Mr. PALMER. In violation of the law thus established cash entries were made upon these lands, both odd and even sections. The law was well known, and when settlers began to penetrate that country conflicts naturally arose. Thus it happened that as early as October, 1882, a case was decided by the acting Secretary of the Interior, following that of the Supreme Court in Eldred *vs.* Sexton, holding that the cash entries were invalid and that these very lands were subject to pre-emption settlement. This was the case of Sipchen *vs.* Ross, 9 Copp's Land Owner, page 181.

I send to the desk the report, commencing at the right-hand bottom corner of page 19, reading that within brackets on that page and the next.

The Secretary read as follows:

[Acting Secretary Joslyn to Commissioner McFarland, October 30, 1882.]

It does not appear from the records of your office that since the joint resolution of 1862 (changing route of railroad) the land in question has been reoffered at public sale at the reduced rate of $1.25 per acre. It has therefore been unoffered land since that date, and hence, under the ruling of the Supreme Court in the case of Eldred *vs.* Sexton, 19 Wallace, 189 (from which I quote at length, because it so clearly settles the law of the present and like cases), the entry of Ross was unauthorized.

Like reasons apply to the case of Ross, and the tract not having been reoffered under its reduced price, his entry must be canceled.

Mr. PALMER. Under these decisions, by the highest legal and executive branches of the Government, holding the lands to be open to homestead and pre-emption settlement, many settlers went in and made homes, and many contests arose and have been for years pending in the Land Department.

As to the even sections, it was finally held by Secretary Lamar that although the cash entries were illegal they might, in the absence of any specific requirement of the statute that the lands should be reoffered, be confirmed by the board of equitable adjudication. (Pecard *vs.* Camens *et al.*, 4 L. D., 153.) The cash entries on even section were held to be voidable only because no provision of the statute required a reoffer-

ing, although it was required by departmental regulations, and that jurisdiction of the board was not ousted except where there was a prior adverse claim.

Under this decision patents ware issued to the cash entrymen; and the pre-emption claimants, instead of applying to Congress for relief, commenced suits in equity in the Federal courts; and two such cases are now pending and ready for hearing at Marquette—Weimar *vs.* Ross, Murphy *vs.* Ross.

5. As to the odd sections, those covered by the pending forfeiture bill, the case was different. The act of 1862 expressly required a reoffering, and upon the 6th day of January, 1888, Secretary Lamar in a test case held and decided that the statute as to odd sections expressly required a reoffering; that the cash entries were therefore void, were no appropriation of the land, and he admitted the claim of the contesting settlers. (Wakefield *vs.* Cutter *et al.*). The Secretary will please read the part within brackets in the matter I send to the desk.

The Secretary read as follows:

The odd-numbered sections along the old line of road had been selected by and certified to the State according to the terms of the grant. As to these lands the joint resolution provided that upon relinquishment being made by the State of all title and claim to such lands, the State would be entitled to equivalent lands along the new line, and then provided for the disposal of such lands as may be surrendered by the State, as follows:

"And it shall be the duty of the Commissioner of the General Land Office to reoffer for public sale in the usual manner the lands embraced in the surrendered lists aforesaid, when duly filed in his office as herein directed."

The case of Pecard *vs.* Camens (4 L. D., 152) involved the question as to the right to locate and make private cash entry of the even sections within the limits of the old line of the Marquette and State Line Railroad after the passage of the joint resolution of July 5, 1862 (12 Stats., 620).

In that case it was held that where the even sections had been once offered, then increased in price and again offered, and while in that condition declared by Congress to be subject to sale at the first price, and private entries were allowed therefor without further offerings,

such entries are not void but voidable for the want of a restoration notice, and may be confirmed by the board of equitable adjudication.

The entries of the even sections were held to be not void because those sections had been once offered at public auction at the minimum price, being the price at which they were actually purchased, and had been continuously in the market from the first offering.

* * * * * *

It is contended by counsel for appellant that the odd sections having been once subject to private cash entry at the minimum price occupied the same status as the even sections after the restoration of said lands to the public domain under the joint resolution of July 5, 1862, and that the ruling in the case of Pecard *vs.* Camens as to the even sections applies to the odd sections as well.

* * * * * *

It is true that the odd sections had been once offered at the minimum price, and were subject to private cash entry at that price up to the time of the withdrawal of said lands for the benefit of the railroad, but the Government subsequently divested itself of the title to said lands by certifying them to the State of Michigan for the benefit of the Marquette and State Line Railroad. When the Government was afterwards reinvested with the title to said lands it was under an act that directed the Commissioner of the General Land Office to "re-offer for public sale in usual manner the lands embraced in the lists of the surrendered lands aforesaid."

When the Government certified these lands to the State of Michigan it parted with its right and title in them, and upon the restoration and certification of these lands to the United States by the State of Michigan the Government took them free from the conditions that had attached to them prior to the certification to the State, and hence they were lands that had never been offered at public sale under the present title of the Government.

* * * * * *

Entries of the even sections were held to be voidable only for want of the restoration notice, a mere departmental regulation, and were held to be not void, because the condition-precedent to the right of private entry having been performed, the power of the officers of the

land office to sell at private entry attached, and having once rightfully vested would continue unless Congress saw fit to fix some other condition by which the power would be divested.

As to the odd sections, Congress fixed a further condition upon the reacquisition of these lands by requiring them to be reoffered at public sale, and this reoffering at public auction was a condition-precedent to the rights of entry of said sections.

The ruling in the case of Pecard *vs.* Camens does not apply to the odd sections, but, on the contrary, the reason stated in said decision for sending the entries of the even sections to the board of equitable adjudication furnishes a sufficient reason for refusing the present application.

The applications of Cutter, Frank, and Laydon will be disposed of as decided by your decision of September 29, 1887, which is affirmed.

Mr. PALMER. Under this decision, and in execution thereof, the Commissioner of the General Land Office has allowed the claim of the settlers.

Other claims of like character are also now pending to be similarly disposed of.

6. The Senator from Wisconsin now desires to have these cash entries, thus decided to be void, and which he concedes to be void, confirmed by Congressional action. This, I insist, shall not be done in any case where there is a conflict with a settler whose claim is now valid under the decision of the Secretary.

I propose to apply the same rule to these rich and influential purchasers of odd sections that has of necessity been accepted by the settlers upon the even sections. When beaten in the Department they did no whining at the doors of Congress, but like men went to the courts for redress.

The cash entrymen on the odd sections who now happen to be beaten should be likewise left to such remedy as the law gives them. If they have rights the courts will protect them. If they have none Congress ought not now to give them any by new legislation.

7. Even where there are no conflicts the equitable rights of the cash entrymen are by no means clear.

It is certain that all entries on odd sections were made by the parties and allowed by the officers in direct violation of repeated orders of the Department.

Although this has been read hitherto by the Senator

from Arkansas [Mr. BERRY], here it is in a consecutive form in the report made by Mr. Henley, from the Committee on Public Lands of the House of Representatives, March 5, 1884, and I send it to the desk and ask the Secretary to read the part between brackets.

The Secretary read as follows:

[Commissioner to register and receiver, July 5, 1865.]

You will not forget that all odd-numbered sections in your district, north of township 40 and west of range 21 (including the lands in contest), were withdrawn from market by order of May 26, 1865, and hence not subject to entry, location, or claim until regularly restored to market.

[Commissioner to register and receiver, May 29, 1873.]

It appears from your returns that you have already allowed a number of entries of these lands without authority from this office; these will be submitted to the board for equitable adjudication, but you will not permit any further entries until the date of restoration.

[Commissioner to register and receiver, March 1, 1879.]

Under no circumstances will you permit any entries of any of these lands, or take any action further than herein directed, in relation thereto, until specially instructed by me.

"[Commissioner to register and receiver, August 1, 1879.]

"In disregard of the above instructions, you continued to permit entries and locations to be made upon these lands, and now report them as being in conflict with lands listed and held for restoration by my decision of 7th March last. As I am unable to account for your action in the premises, you will please report at once, giving in full the reasons for such seeming misconduct."

"[Commissioner to register and receiver, October 12, 1880.]

"By said letter of 29th May, 1873, you were directed to 'permit no further entries until the date of restoration.' Your attention is invited to said letter, and you will promptly report by what authority you have allowed entries upon lands within the limits of the withdrawal made for said railroad."

No attention whatever was paid by the local officers

to these repeated orders, who, as before stated, continued to dispose of these lands, and up to October 12, 1880, had permitted entries covering over 88,000 acres of land within the limits of the railroad grant alone.

During the argument of the matter before your committee it was asserted by counsel for homestead and pre-emption settlers that most of the applications to enter were filled out in the handwriting of the then register of the Marquette office, the officer to whom the various prohibitory orders were sent; that they were frequently made on top of subsisting pre-emption and homestead claims, and that the register who allowed the most of them is now a member of a "committee of land-owners," urging the passage of the confirmatory bill and signing circulars levying assessments to aid its passage, one of which was read to your committee. Some of these allegations seemed to be sustained by the proofs.

Your committee is unable to resist the conclusion, under all the facts of the case, that not only were these private entries invalid and illegal, but that certainly in some cases they must have been made fraudulently and by collusion with the officers of the local land office. They are accordingly of opinion that an act confirming them should not be passed.

3. SETTLERS' CLAIMS.

There also appeared before your committee another class of persons alleging rights in these lands, namely pre-emption and homestead settlers. They asked no remedial legislation. They rely upon the law as it stands to protect their rights and simply desire to be left untrammeled to assert their claims in the Department and the courts. Since the decision of the Supreme Court in Eldred vs. Sexton, and subsequent action thereunder by the Interior Department, a large number of such settlers are alleged to have gone upon these lands and initiated claims. Several hundred of such claims are now pending in the General Land Office and the Interior Department, in various stages of adjudication, but their ultimate settlement is delayed and postponed by appeals to Congress on the part of the owners of the cash entries and canal selections, similar to that now under consideration. These petitioners use their applications to Congress to stop all adjudication in the Department.

We are of opinion that none of these private entries or canal entries should be confirmed, but that the whole matter should be entirely dismissed from Congress, and that the proper executive officers or courts having jurisdiction over these matters should proceed to dispose of them according to law.

We accordingly report back H. R. No. 180 amended to conform to these views, and recommend its passage.

Mr. PALMER. It is useless to attempt to avoid this fact by slurring at a majority report of the House committee. No one has ever denied or ever can deny the fact stated, namely, that the above are direct and positive orders from the Commissioner to the register and receiver prohibiting the sale of these odd sections. They were beyond all question sold in direct and known violation of these orders. Although there may have been some innocent purchasers, and probably were, I believe that the majority knew that they were gambling when they purchased these lands. All this was done after the removal of Edwards, the honest register, who refused to allow the illegal canal selections, and the appointment of Campbell, his successor. I send up to have read what there is marked on page 18. There is a natural sequence of the selections for the canal.

The Secretary read as follows:

This was accomplished by securing the removal of Edwards, the then register, who refused to correctly act as a tool of the company, and the appointment of Ambrose Campbell, who administered the office after his appointment entirely in their interest and in the interest of other corrupt combinations. John F. Driggs, then member of Congress from that district, was attempting to carry some 11,000 acres of land for his own benefit, without paying the Government for it. The lands had been marked to his name upon the plat-books. He was unable to raise the money, and made arrangements with the company by which the lands were to be marked off to them, and they were to carry them for the benefit of Driggs until such time as he could raise the requisite amount to complete the purchase.

Edwards refused to be a party to this arrangement. Driggs and Avery, president of the canal company,

then conspired to secure his removal and the appointment of Campbell. This was accomplished. The canal company thereupon secured the approval of their illegal list; the 11,000 acres of land were marked up to the canal company, and were by them carried for Driggs for some three years—until 1871—when the money to complete their purchase was advanced by one Sage, to whom the certificates issued. Driggs realized some $40,000 out of the transaction, and the canal company secured a list of its illegal selections. The whole transaction, as above stated, is shown in the testimony (Runnells, 289 to 296; Frost, 310; Sage, 364, 365; Mullally, 315, 316, 365; Churchill, 307 to 309; Exhibit No. 26, page 419).

Mr. PALMER. To show how and under what circumstances some of these selections were made, I now present the testimony taken in the investigation reported in the Portage Lake and Lake Superior Ship Canal Company by the Committee on Public Lands in the Forty-eighth Congress. There is but very little of it, but it will give an insight into the way things were manipulated in that land office. There are four selections marked on the three pages and inclosed in brackets, which I ask the Secretary to read from the book I send up to the desk.

The Secretary read as follows:

By Mr. MONTGOMERY:

Q. Where do you reside?

A. In Marinette, Wis.

Q. Across the river from Menominee, in Michigan?

A. Yes.

Q. How many years have you lived there?

A. About twenty-five years.

Q. What has been your employment for the past fifteen years?

A. For fifteen years I have been engaged in the lumber business.

* * * * * *

Q. During the summer or fall of 1873 did you have an application from any source to make a purchase of any of the lands involved in this matter? I refer to the application of Mr. Selden?

A. Yes.

Q. Within what grant were those lands?

A. As I understand, they were within the grant of the Ontonagon and Brule River line.

* * * * * *

By Mr. Montgomery:

Q. What did Selden say to you?

A. I cannot give the conversation. I can only give you what I remember—the substance of it.

Q. Give us the substance of it.

A. He said that there was an old lapsed railroad grant, and that the lands could be entered. He thought there would be some mineral in them, and that it would be good policy to enter them. I told him that I would look the thing up; that I had heard of this old grant, but knew nothing personally about it. I found out afterward——

Mr. Payson. Tell what Selden and you said.

The Witness. I did not want to invest in it.

* * * * * *

Q. Did you afterwards make a purchase within the same limits?

A. Yes.

Q. At what time, and through whose solicitation?

A. In April, 1870, through Mr. Selden's son.

Q. Did you have any talk with other parties living there, on the subject of those lands being reserved from the market?

* * * * * *

Question repeated.

A. Yes.

Q. With whom?

A. It was a subject of general conversation.

Q. State to the committee whether or not it was generally known there among men dealing in the lands that these lands were within what was termed a lapsed railroad grant?

A. I think it was at that time.

Q. Afterwards you say that in 1880 you did buy some of the lands?

A. Yes, sir.

Q. At the solicitation of young Mr. Selden?

A. Yes.

Q. You bought them knowing the situation, did you?

A. Yes.

* * * * * *

Q. Did you expect to hold that land?

A. I was willing to take my chances of it.

Q. If you lost it, you were willing to stand the loss?

A. Yes. I did not know anything about this railroad grant until 1878. I never entered any land in that vicinity until my attention was called to it.

Mr. PALMER. 11. If any of these private entries, thus covered from beginning to the end with the trail of the serpent, are to be confirmed, I insist that such confirmation should be clearly limited to cases where there is no conflict, and that Congress ought not, in any event, to attempt to undo and set aside the decision of the Department in any case therein pending.

There are undoubtedly some of these cash entries that should be confirmed. They were undoubtedly honestly made, and those that do not come in conflict with the settlers and homesteaders I am perfectly willing to have confirmed. Those that lost their lands will get their money back, and I should be willing to go as far as to pay them interest upon it. But to turn men out and off those lands who have gone there by the decision of the courts, and who had good reason to suppose that they had a right there, who have cleared up farms, I think would be an outrage unworthy not only of the American Senate, but even of a much less dignified body.

Now, to recapitulate, about twenty years ago, in the case of Schulenberg *vs.* Harriman, it was decided by the Supreme Court of the United States that railroad grants were not forfeited by the expiration of the time which the companies were given in which to build the roads. That was what first gave the animus and awakened the people up there to the condition of these lands on the Northern Peninsula.

Then in Eldred *vs.* Sexton, about fifteen years ago, it was decided that the lands were not subject to private entry until first offered at public sale, and even when once offered and then withdrawn from market were not again subject to private sale until another offering.

It was under this decision that a great influx of homesteaders went in upon that land. Then in the case in the Land Office of Sipchen *vs.* Ross in 1882, Secretary Teller decided that cash entries on these Michigan lands (it was an even section) were void under the doctrine of Eldred *vs.* Sexton, and were hence open to pre-emption and homestead settlers.

Then in case of Wakefield *vs.* Cutter, Secretary

Lamar decided that cash entries on odd sections were absolutely void, because in the case of odd sections a reoffering was required by specific provision of the statute of 1862.

These poor men, these men seeking homes, have been invited on there by the decisions of the courts and the rulings of the Land Office. I think nothing should be done to militate against their interest. Where there is any conflict let it be fought out in the court, and not have the Congress of the United States take sides.

I have just received a telegram of the following character, which will be very good reason for the course that I am now about to take, dated—

BEAR LAKE, MICH., *6th*.

TO THOMAS W. PALMER:

Don't exclude pre-emption and homesteads taken since January 1. Hundreds of homes have been made since.

GEO. W. HOPKINS.

You can see, Mr. President, the way these men have been led on to these lands by the decisions of the courts and the Land Office.

I now withdraw my second amendment and submit this:

Provided, That nothing herein contained shall be construed to confirm any private entry of lands heretofore settled upon and now claimed under color of the homestead or pre-emption laws, but in all such cases the Commissioner of the General Land Office and the Secretary of the Interior shall hear and determine the claims of the parties respectively according to the provisions of existing law.

The PRESIDING OFFICER (Mr. MANDERSON in the chair). The question is on the amendment proposed by the Senator from Michigan [Mr. PALMER] to the amendment of the Senator from Wisconsin [Mr. SPOONER].

Mr. SPOONER. Mr. President, I do not often ask the attention of the Senate, and I do not intend to occupy the time more than ten minutes. I should be glad, therefore, to have the attention of Senators.

I am not willing to allow the Senator from Michigan or any other Senator to go beyond me in protecting the

interests of any honest man who in good faith under laws of the United States settled upon these lands. My amendment is intended, accepting as I did that which he proposed, to protect all such settlers; and I ask the Senators who are here to give attention to the amendment suggested by the Senator from Michigan which I have accepted:

That nothing herein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of January, 1888, arising or asserted under color of the laws of the United States.

The Senator from Texas [Mr. COKE] does me the honor to listen. That amendment, I willingly submit to him or to any other good lawyer, protects clearly and unqualifiedly every pre-emption or homestead claim down to January 1, 1888, which was an honest claim. No man in the Senate, or out of the Senate, has a right to invoke the protection of the laws of the United States for claims which are not honest. Under that amendment it is utterly impossible that this confirmation can be held operative to prejudice the right of any bona fide homesteader or pre-emption claimant.

Now, when it is asked that Congress shall go beyond that, I beg leave to say to the Senator from Michigan, with all due respect to him, that the proposition is subject to the just suspicion that it is the purpose to ask Congress to legislate, not on broad principles which shall fairly take in and protect all who ought to be protected, but under some specious guise or disguise to legislate for particular cases, the merits of which the Senate does not understand.

The amendment which the Senator now sends to the desk in lieu of the one which we have been debating is objectionable in two respects. In the first place, it eliminates from the subject the element of good faith and proposes to confirm to all who have settled, no matter if they have settled for hire, or in pursuance of a conspiracy, or for any other reason not in good faith under the laws of the United States, for the purpose of obtaining homes.

It goes further than that. It asks that up to the passage of this act, if it shall be passed and become a law, all men who settle or squat upon these lands shall

be treated as settlers in good faith. On the 1st day of January, 1888, this controversy was known to the people of that country to be existing. The bill was pending. The matter in dispute is not a new one; and it is not just to the cash entrymen who live in different States that men, knowing this was a subject of legislation, knowing the controversy that there was about it, should be permitted to go upon these lands even while this discussion goes on and insist that their claims shall be protected by act of Congress.

Now I want to call to the attention of the Senate to the fact, for I understand it to be a fact, that there are equities involved in the amendment which I offered, which is confirmatory in its nature, that are just as sacred as can be the equities of any homesteaders.

The Senator from Arkansas [Mr. BERRY] the other day read from a report made by Mr. Henley, as a member of the Committee on Public Lands of the other House. I want to read for the information of the Senate—and it will take but a moment—from a report made by Mr. PAYSON, also a member of that committee, signed by Mr. PAYSON, Mr. Van Eaton, Mr. Strait, Mr. Belford, of Colorado, and Mr. OATES, recommending relief to these cash entrymen.

I take it no one will question the general accuracy of Mr. PAYSON or his devotion to the interests of honest homestead settlers. There is no man in this country who has gone further or done more or spent more time than Mr. PAYSON in recovering from railroad companies lands granted but not earned. This report enables me to answer one or two questions put to me by the Senator from Missouri [Mr. COCKRELL], which I was not at the time able to answer. Mr. PAYSON says:

Now the parties entitled to relief may be classified as follows:

1. Those whose titles are endangered because the lands the Government sold them had not been reoffered at public sale after having been withdrawn for railroad purposes.

I do not care whether these entries are void or voidable. I plant myself on this broad proposition, that where citizens of the United States by an honest mistake, mutual as between them and the land officers of the Government, entered lands at the Government land

offices which were held out to the public as open to entry, pay their money into the Treasury of the United States, receive the land officers' certificate, pay taxes for years upon the lands, mortgage them, sell them, and build upon them, no honest government can insist upon a mere technical defect in that title and afford to refuse them the protection of confirmation. I know of no different rule of morals or good faith or common honesty which is to govern the United States in its dealings with its citizens than that which prevails among honest citizens in their transactions with each other. Mr. PAYSON further says:

2. Those whose titles are endangered because the lands the Government sold them lay within the limits of the unforfeited Ontonagon and State Line grant.

Over twelve hundred citizens of the United States are interested in these titles. Of these 384 live in Michigan, 89 in Wisconsin, 37 in Illinois, 20 in Pennsylvania, 20 in New York, 17 in Ohio, 7 in Massachusetts, and 126 scattered through other States and Territories.

Twenty-one of the original purchasers are dead, and those who now claim protection are their widows and orphans.

It is certainly not a persuasive proposition to say that where these men entered lands at the Government land offices which were held by the Government agents open to entry, paid their money into the Treasury of the United States, received patents for the purchased lands, their widows and orphans, the purchases having been in good faith, shall not be protected. I do not ask that they even shall be protected against the claims of bona fide settlers, pre-emption claimants, and homesteaders inaugurated prior to January 1, 1888. I yield to all such claims. I would not vote for this confirmatory act if it did not protect the bona fide settlers; but I am not willing to go further than that, and I think the Senator from Michigan ought not to ask the Senate to go further than that.

Again I read from Mr. PAYSON'S report:

The claimants are neither all rich nor all poor. They represent all grades of wealth. There are over four hundred, each of whom owns 160 acres or less. Some own as low as 10 acres.

Most of the larger tracts claimed are owned by a number of persons, although they stand in the name of a single individual of a lumbering company. There are probably in all over 1,200 owners, including the villagers, at Stambaugh and Iron River.

The Land Department for a term of years treated the lands within these grants as "offered" public lands, and sold them exactly as it sold other public lands. According to the conditions of the granting act, the lands were to revert to the United States in 1866. All sales were made after that date. Most of the sales were made after the governors of Michigan had formally relinquished the grants in 1868 and 1870, and up to 1874.

I believe it was the general sentiment of the profession in the country up to 1874 that under these land grants, the time having expired with performance of the condition-subsequent, the title *ipso facto* reverted to the United States. I remember that the Attorney-General, Mr. Williams, delivered a very elaborate opinion, based upon what he thought were pertinent decisions, in which he declared that without any entry, legislative or otherwise, upon the part of the Government, the title reverted, and that was the judgment of the officers of the United States until the Supreme Court in 1874 decided otherwise in the case of Schulenberg *vs.* Harriman. Mr. PAYSON'S report continues:

The sales were made by the Government officers in good faith, and the purchases made in equally good faith.

There have been sold in the two grants more than 800,000 acres. Over a million of dollars have gone into the Treasury therefor.——

And you hold that money to-day in the Treasury of the United States taken from the purchasers, and it has been used as the money of the Government all the years which have elapsed since these transactions occurred.——

Patents have issued for upwards of 483,000 acres, and 337,000 acres are held on the ordinary certificate of entry.——

What do Senators say to that? Patents for these lands have issued to the purchasers to the extent of

483,000 acres, and, as I said the other day, the purchasers during these years have paid taxes on them, mortgaged some of them, and they have been subject to sale on execution. They have been treated in all respects as the land of purchasers. Any cloud upon such a title should be removed by Congress, if in its power.

There are one or two other facts which are pertinent and proper to be brought into the discussion. I ask the attention of Senators to this statement. Mr. PAYSON says—and this subject was pending before that committee for a long while and underwent an exhaustive investigation:

More than half of the present owners bought their lands at second and third hand on the faith of the Government patent or certificate. They paid an average price of nearly $8 per acre. Some of them paid as high as $100 per acre.——

I suppose that was for lands in which mineral was discovered.——

The aggregate paid by these second-hand owners is upwards of $1,283,000. Most of them reside in other States than Michigan, excepting the villagers, and during all these years have paid taxes to the State of Michigan.

There are two considerable villages within the limits of these grants, namely: Iron River and Stambaugh. The owner of every lot is in danger of losing his lands and improvements. These village owners are not included in the second-hand purchasers given above, nor do they form part of the 700 owners first mentioned.

In 1882 (we have no later information) 213 persons residing in Iron River owned 243 village lots. These had improvements consisting of houses, stores, banks, shops, etc., aggregating in value $309,800.

In Stambaugh at the same time there were 39 persons owning 44 lots with improvements, worth $41,800.

These villages have grown rapidly since, and now have churches, schoolhouses, and other public buildings.

Both villages are on even sections, within the six-mile limits, and the lands, not having been reoffered

at public auction, fall under the decision of the General Land Office in Sipschen *vs.* Ross.

Without affirmative relief from Congress, these villagers are certain to be greatly distressed by harassing lawsuits, and will probably lose their lands and improvements.

Indeed at this time the section on which the village of Stambaugh is located is under nine different applications for entry (five of which are by scrip of some kind) by adverse parties, who are asserting the invalidity of the original title we are presenting, and one of which has been made by an enterprising real-estate dealer, since the committee declined to aid bona fide purchasers, as against mere technical defect in title, the curing of which defect could harm nobody.——

It turns out here that for 480,000 acres the Government not only took the purchase money from the purchasers, but the executive officers actually executed and delivered the patents, the highest evidence of title known to the law in this country.

I desire also to call to the attention of the Senate the following statement from the report:

The village of Iron River is also under four different adverse "filings," all made in 1882, the parties making them setting up, as we are advised, this same technical defect. Several of these "scrip filings," being on these villages, are represented by one of the attorneys who oppose validating any purchases before this committee. In like condition are several iron mines, developed at vast expense and now very valuable, "filed" upon by these sharks.

The relief proposed by the substitute has been invariably approved by the different Secretaries of the Interior since the question arose.

Secretary Schurz, in a letter to Hon. George L. Converse, chairman of the House Committee on the Public Lands, under date of January 7, 1881, declared that Congress should take prompt action for the protection of the best interests of all parties concerned in these old grants, and recommends a section to the then pending bill providing for the affirmation and protection of all private entries, homesteads, etc., "to the same extent and in the same manner as if no grant or reservation of said lands had ever been made."

Commissioner Williamson made a similar recommendation in a letter to the Secretary on the 5th January, 1881.

Secretary Teller, under date of February 13, 1884, in a letter to Mr. PAYSON for the use of the committee, as to these lands, after saying that the settlers should be protected, says, "I think all parties who made cash entries in good faith, having been misled by the officers of the local land offices, ought to be allowed to make title."

Now, my proposition is simply that the title of all these cash entrymen who shall be able first to satisfy the Secretary of the Interior that their entries were made without fraud and in the belief that they thereby acquired a valid title from the Government shall be confirmed except where that confirmation would conflict with the claim of some bona fide claimant under the pre-emption or homestead laws of the United States down to January 1, 1888.

If my friend from Michigan can think of stronger language for the protection of honest homestead or pre-emption claimants than he has embodied in the amendment which he offered, and which I accepted, I am quite willing to accept it. I think it covers the ground absolutely already, and it is not fair to ask the Senate of the United States to enact as a law any decision of the Secretary of the Interior. A number of them have been referred to. I doubt if there is a Senator on this floor who knows what they are.

I repeat this in regard to them. If they are right, if they are founded in a proper application of correct principles of law, the Senate may safely assume that they will stand. If they are not right in law, then any subsequent Secretary of the Interior whose duty it is made to investigate and pass upon them ought to be at liberty to declare the law as to them as he finds it to be.

There are some propositions that can not be made plainer by argument. One is that a purchaser in good faith from the United States ought to be protected in his title. The other is that a bona fide homesteader ought to be protected in his title under the circumstances here. This amendment, modified by the Senator from Michigan, covers both of these propositions. If the Senator [Mr. BLAIR] in charge of this bill to-day can

make stronger in the interest of honest homestead claimants the amendment offered by the Senator from Michigan, I shall be willing to accept and adopt his suggestion.

Mr. BLAIR. I have the original amendment offered by the Senator from Michigan which I understand is now incorporated with the amendment offered by the Senator from Wisconsin.

Mr. SPOONER. Certainly, I accepted that.

Mr. BLAIR. I should like to ask the Senator what he understands to be the full force and effect of the words in the fourth and fifth lines "arising or asserted under color of the laws of the United States?" Would it suit him as well to have those words stricken from the amendment.

Mr. SPOONER. It would suit me as well to have those words stricken from the amendments, if it would serve the homestead settlers as well, but it would not.

Mr. PALMER. The Senator will permit me to answer. For many years the land office at Marquette evidently was run in the interest of men who had money, and homesteaders' applications were rejected, and on that very account the language is used. They had no rights that the officers felt bound to respect, and therefore it is that that phraseology is used, "arising or asserted under color of the laws of the United States."

Mr. BLAIR. It struck me that——

Mr. PALMER. Will the Senator allow me one word further? I do not think he need discuss the subject, as I have withdrawn the amendment.

Mr. BLAIR. Will the Senator permit me to say that if he will strike from the amendment, which is already incorporated, as I understand, in that of the Senator from Wisconsin, the word "arising," I think it would be much broader to effect this purpose.

Mr. PALMER. If it will make it broader I will cheerfully accept it.

Mr. SPOONER. I think, without imputing fraud to any citizens of Michigan——

Mr. PALMER. I do not impute fraud to anybody.

Mr. SPOONER. Without assuming that the land officers of Michigan were bought up, or that any large number of gentlemen who had dealings with the land office were guilty of bribery or corruption, the situation is such that the homesteaders need that language. As I understand it, they have settled in some cases upon

lands which were at the time confessedly not open to settlement, lands withdrawn for railroad purposes.

Mr. BLAIR. Would the Senator object to striking out the words "arising or?"

Mr. SPOONER. I do not object to it, if the Senator from Michigan is willing, although I think the words are wisely used in that connection.

Mr. PALMER. Let me get the point.

Mr. SPOONER. I think these gentlemen——

The PRESIDING OFFICER. The hour of 2 o'clock having arrived, it is the duty of the Chair to lay before the Senate the unfinished business of the last day's session, being the bill (S. 2083) to provide for the establishment of a Bureau of Animal Industry, and to faciliate the exportation of live stock and their products, to extirpate contagious pleuro-pneumonia and other diseases among domestic animals, and for other purposes.

Mr. BLAIR. The forfeiture bill has been under discussion a long time and I am not aware that there is further controversy when these points shall be disposed of. Unless some Senators indicate a desire to discuss the bill further, I would ask that it be continued to a vote. I think we can soon dispose of it.

Mr. MITCHELL. I think we can get a vote to-morrow. There are several amendments made as in Committee of the Whole since the last print.

Mr. PALMER. I think the bill should go over.

Mr. MITCHELL. I suggest to the Senator in charge that there be a reprint of the bill as amended in Committee of the Whole.

The PRESIDING OFFICER. The Chair understands such a reprint has been made.

Mr. MITCHELL. Not since the 17th of April. Amendments have been adopted since then.

The PRESIDING OFFICER. The Senator from Oregon [Mr. MITCHELL] asks that the land-forfeiture bill be reprinted.

Mr. MITCHELL. Including the amendments already adopted as in Committee of the Whole.

The PRESIDING OFFICER. The Chair hears no objection and that order will be made.

MAY 8TH, 1888. Consideration of the bill was resumed by the Senate, as follows (Cong. Record, May 9th, 1888, pp. 4009–4013):

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. 1430) to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes.

The PRESIDENT *pro tempore*. The pending question is on the amendment of the Senator from Michigan [Mr. PALMER] to the amendment of the Senator from Wisconsin [Mr. SPOONER].

Mr. BERRY. Mr. President, in the very briefest way possible I wish to reply to a few observations made yesterday by the Senator from Wisconsin [Mr. SPOONER]. The difference between the amendment of the Senator from Michigan and that of the Senator from Wisconsin I do not propose to discuss. I am opposed to the amendment of the Senator from Wisconsin, either with or without the amendment of the Senator from Michigan.

The Committee on Public Lands sought to forfeit all unearned lands, all lands opposite the uncompleted portions of the railways. That committee were of the opinion that they could not by legislative act settle the existing claims of the various claimants in the State of Michigan. They believed that any amendment of the character of this one would tend to defeat the forfeiture act. Therefore the committee said they would leave each of the parties there to seek his rights or his remedies before the Department or before the courts of the country, and so the bill stands to-day without this amendment.

I wish to call the attention of the Senate to the fact that the amendment of the Senator from Wisconsin not only confirms cash entries of lands proposed to be forfeited by this bill, but thousands of acres of other lands that were entered for cash, which lands are in no way connected with this bill and are not included in the forfeiture. From the remarks of the Senator from Wisconsin yesterday the Senate would infer that these lands were agricultural lands and were covered all over with homes and farms. The facts are that the great body of this land is not agricultural land. It is timber land; it is mineral land; it is land of very great value; and if the land was put up and sold to the highest bidder, as the law requires should be done, it would bring into the Treasury of the United States a vast amount of money.

The Commissioner of the General Land Office knew that these lands were not subject to sales at private

entry. From 1865 to 1880, for fifteen years, he called the attention of the local officers at Marquette to the fact that these lands were not subject to private entry until they should be first offered at public sale, so as to give every man an opportunity to bid. They continued to sell them at private sale from time to time in the face of repeated orders from the Department here not to do so.

The committee that investigated the matter reported that these lands were purchased by less than thirty corporations. They purchased them at private entry, and the House report says that the register of the local land office so disobeyed the orders of his superior that the greater part of these applications were made out in his handwriting. The committee furthermore says that the people who entered these lands at $1.25 an acre were the agents of corporations; and yet the Senator from Wisconsin I presume regards them as innocent purchasers, and he says that it would be dishonest on the part of the Government not to confirm these entries.

Mr. SPOONER. Do I understand the Senator to say that he presumes I am one of the innocent purchasers?

Mr. BERRY. No, sir. If the Senator so understood me he misunderstood me. I said nothing like it. I said that the Committee on Public Lands of the House had stated that the register of the land office was interested to-day in these lands, and I presumed that he was one of the innocent purchasers of whom the Senator from Wisconsin was speaking.

Now, Mr. President, these lands the law required should be sold to the highest bidder. They were entered by these companies at a dollar and a quarter an acre in the face of the law, and now they ask the Senate of the United States to come in and confirm to them an immense body of lands, some of which the Senator from Wisconsin said yesterday had sold at $100 per acre. If a man down in the hills of Arkansas or upon the plains of Wisconsin twenty years ago purchased 40 acres of land from the Government, and built his home upon it, and for some cause his title proves to be invalid, he can only come to the Government of the United States and get back his dollar and a quarter an acre; but these parties who the Senator says paid into the Treasury a million dollars can go there to-day and get their million dollars back, because that is the law, and if their entries were invalid they have a right to have the money back. I beg the Senator to tell me why

Congress should take a man's land in Arkansas and give him back only one dollar and a quarter an acre without interest, and why he says it is dishonest on the part of this Government to refuse to confirm to these syndicates and these corporations 400,000 acres of land, 800,000 including the even sections, but 400,000, as was said yesterday, included within the odd sections.

If these lands are worth from ten to twenty or thirty dollars an acre, as is asserted, and will bring it at public sale, the law requiring them to be sold at public sale, I ask why it is that certain favored individuals can go and purchase them at a dollar and a quarter an acre in the face of the law and not give every other person an opportunity to purchase, and then ask the Congress of the United States to confirm their titles?

These are the objections I have to it. I know no party connected with it. The information I have is from the testimony taken before the House committee contained in the majority and minority reports made by that committee. It is open to every Senator here to examine that testimony. I assert that no one can read that testimony from beginning to end without coming to the conclusion that this register acted in a fraudulent way when he allowed the entry of these lands. I can not perceive that it is dishonest for the Senate of the United States to refuse to ratify such proceedings. The ideas of the Senator from Wisconsin and mine differ if he thinks it is dishonest for any man to refuse to vote for the confirmation of these titles when this testimony, as a majority of a committee of one branch of Congress has said, shows that they were procured in that way. It seems to me that it is unjust.

The Senator from Oregon [Mr. DOLPH] a few days ago delivered a long speech here tending to show that the party to which he belonged had been in favor of forfeiting all the unearned lands and that the difficulty was that the other branch of the Congress, a majority or whom belonged to a different party, had been the obstructionists; yet he is willing to-day to allow an amendment to go on this bill that has but one tendency, and that is to defeat the forfeiture of these unearned grants, when all parties have professed again and again that they were in favor of their forfeiture.

If this amendment is not adopted, if the several parties, the cash entrymen, the canal men, and all the other claimants have equities, let the parties come to Congress in a separate bill; but do not seek to load

down this bill, which is a forfeiture bill, pure and simple, with a matter which will tend to defeat the forfeiture bill and to defeat all legislation whatever.

Mr. President, I have talked on these amendments more frequently than I intended, but I am earnestly in favor of forfeiting the unearned land grants. I am earnestly in favor of the bill passing both Houses of Congress at the earliest day possible to accomplish that result. I believe that if this amendment is placed on to this bill the probabilities are that this Congress will do as the last one did--that is, that these forfeitures will not take place because of differences between the two Houses. Therefore, I trust that neither the amendment of the Senator from Wisconsin nor that of the Senator from Michigan will be adopted, but that both will be laid on the table, and that the bill as it comes from the committee will be passed by the Senate of the United States.

Mr. SPOONER. Mr. President, I am in favor of the passage of this bill, for I am in favor of forfeiting every acre of unearned land granted to a State or to railway companies for the construction of railroads that there is in the United States; but this bill, general in its terms, operates throughout the United States, and it proposes to forfeit and throw open to settlement lands which have already been purchased from the United States. I think it is manifestly proper that in adopting general legislation of this character Congress should provide for the protection of those purchasers if they ought to be protected.

That they need protection no one denies. It is admitted that these Michigan entries are invalid for the reason that, notwithstanding the lands were held by the land officers to be open to entry, they had not been reoffered, as required by law. In the case put by the Senator from Arkansas as to the failure of title in his State, I should be willing to vote to confirm those titles if the purchases were in good faith. Anywhere in the United States, where a man has bought from the Government of the United States at the Government land office land, believing that it was open to entry, has paid his money, there being no fraud in the transaction, I would cheerfully vote to confirm his title, and I think nearly every Senator would cheerfully so vote.

The Senator from Arkansas cannot successfully indict the integrity of all the owners of these lands by the means he adopts for that purpose. There are 1,200 of

them as stated by Mr. PAYSON in his report. At least half the men interested to-day in these lands are men who have bought from the original entrymen, and hold under conveyance from them and their grantees. Certainly the Senator from Arkansas does not impute fraud to them. Some of these original entrymen, who I presume still hold the land which they bought, I happen to know, and they stand as well, and deservedly stand as well in the community in which they live as the Senator from Arkansas can stand in the community in which he lives.

Mr. PALMER. Will the Senator from Wisconsin yield for a moment for a question?

Mr. SPOONER. Certainly.

Mr. PALMER. Will he tell me how those 1,200 owners are distributed?

Mr. SPOONER. Mr. PAYSON states that they are distributed in this way: that 384 live in Michigan, 89 in Wisconsin, 37 in Illinois, 20 in Pennsylvania, 20 in New York, 17 in Ohio, 7 in Massachusetts, and 126 are scattered.

Mr. PALMER. I meant as to their property, their holdings.

Mr. SPOONER. I do not know.

Mr. PALMER. They are mostly in two towns which are essentially out of this case. They are on the even sections, and the Department has decided in favor of the cash entries.

Mr. SPOONER. It is stated in this report that 400 of these people own tracts of land not exceeding 160 acres each, small tracts of land. Now we have their money; the Senator says let them come and take back their money with interest. I ask the Senate of the United States if that is any measure of protection or justice to these people. They have paid taxes on these lands for years; some of them have sold them in good faith and given warranty deeds of them. Others have made improvements upon them, and it would be no fair adjudication of their claim simply to give them back the purchase-money which they paid into the Treasury.

I am utterly at a loss to understand how the Senator from Arkansas can reconcile his attitude as to this amendment with his attitude as to the bill itself which comes from his committee. I am only asking by this amendment that Congress shall protect the title of these men whom the Secretary of the Interior shall find to

have purchased in good faith. Of course there is a defect in the title.

Mr. BERRY. Will the Senator allow me there?

Mr. SPOONER. Certainly.

Mr. BERRY. Does not the Senator know that so far as the provision in the amendment that the Secretary of the Interior shall confirm the title of those who he is satisfied entered in good faith is concerned, the decision would be on an *ex parte* hearing where the Government would not be represented and where these parties would only furnish evidence of good faith? So it would absolutely amount to a confirmation of that entire body of 800,000 acres of land. I care not how much fraud a register of the land office who disobeyed the orders of his superior and in his own handwriting filled out applications to lands that he knew were not subject to private entry and then afterwards became the agent through whom these sales were made may have committed, evidence will no doubt be furnished to show good faith, especially where the Government is not represented on the other side.

Mr. SPOONER. I do not think the Senate of the United States will dispose of this question upon the assumption that the statements or suspicions presented by Mr. Henley in his report are to be taken as absolutely conclusive on the questions of fact. Mr. PAYSON and the gentlemen who joined with him in the minority report say there is no evidence of collusion or fraud in the transactions, that there is no evidence or fraudulent purpose on the part of the land officers, no evidence of fraudulent purpose on the part of the purchasers; and how the Senator can talk about the Government of the United States not being represented when the amendment provides that the very officer who must first be satisfied by satisfactory proof of the good faith of these parties is an officer of the United States, a Cabinet officer of the United States, the Secretary of the Interior, I can not understand. The Secretary is at liberty under this amendment to inaugurate any investigation he chooses. The evidence must be made satisfactory to him. He may demand such measure of testimony as he sees fit to be taken in such manner as he may indicate. So it seems to me there is nothing whatever in that objection.

But, Mr. President, the Senator seems to me, as I said, to be inconsistent. He would not confirm, no matter in whatever good faith the purchaser may have

entered the land, one of these entries. Now this bill provides for forfeiting land on the ground that the railway companies never have earned it, and that therefore the Government of the United States has under all decisions the right to resume it; and this very bill which the Senator supports, in its second section provides—

That in all cases where persons are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed in good faith prior to January 1, 1886, they shall be entitled to purchase the same from the United States, etc.

How purchase "from the United States?" They are to be entitled to purchase by paying the regular price. The land is not to be reoffered. They are entitled under this bill to protect their purchases in good faith by paying into the Treasury of the United States $1.25 or $2.50 an acre.

Mr. BERRY. One moment. The bill provides that they shall be allowed to purchase by paying $2.50 an acre. That has no reference whatever to lands entered at private entry. It applies to the railroad lands out West, and it does not confirm their title, but simply gives them a preference over others to purchase at the given price.

Mr. SPOONER. Exactly. Where they have not paid the Government, where the land is resumed on the ground that it belongs to the Government, the bill to which the Senator agrees protects the title obtained in good faith from the railway company. True, the company did not own the land, but this authorizes the purchaser from the railroad company as against every other man in the United States, any homestead settler under the laws of the United States, to go to the land office, and by paying $2.50 an acre, take the land; now why protect the titles of men who have purchased in good faith from a railroad company which confessedly had no title, and yet refuse to protect the title of men who have purchased in good faith from the very Government itself? They authorize these men who have not paid the Government to go to the land office and pay the United States. In the cases which I am endeavor-

ing to protect by this amendment the parties have already gone to the land office of the United States and entered the land and paid the money.

Then I should like to know—for this appears to be satisfactory to the Senator from Arkansas—how can the question of good faith in the case of a purchaser from a railway company be determined fairly to his satisfaction, and yet the Senator be able reasonably to say that the Secretary of the Interior can not fairly determine the question of good faith under the amendment which I offered.

I do not intend to take up the time of the Senate any further in discussing the proposition.

Mr. MITCHELL. I wish to ask the Senator from Wisconsin a question. I desire to know why the amendment should be limited to the State of Michigan alone?

Mr. SPOONER. I limited it to the State of Michigan because these lands were all unearned in the State of Michigan, and I knew of no other instance in the country which would come within the purview of the provision. I thought it might be objected to if it were not so restricted. That is why I limited it.

Mr. MITCHELL. Mr. President, is an amendment in order at this time?

The PRESIDENT *pro tempore*. The bill is not now subject to amendment, an amendment in the second degree being pending.

Mr. MITCHELL. I shall at the proper time, unless I change my mind or see some good reason why I should not do so, move to amend the amendment of the Senator from Wisconsin by striking out, in line 4, the words "the State of Michigan" and inserting in lieu thereof "any State or Territory."

Mr. TELLER. Mr. President, the lands in controversy have been the subject-matter of discussion in the Interior Department for several years. I do not recollect the exact statements that have been made pro and con, and I have never read the report referred to by the Senator from Arkansas [Mr. BERRY] as made in the House of Representatives, but I am morally certain that it can not be alleged against any considerable portion of these cash entries that there was any corruption or any fraud. What may have been the conduct of some officials, whether they made an error or whether they acted willfully and knowingly for the purpose of securing this land to themselves, I think there has been

practically no complaint that the entrymen themselves committed any fraud on the Government.

It was a question that baffled and annoyed the Department for some time as to the status of these entries, whether they were valid entries or whether they were not valid. As I understand now the proposition is simply to say to the men who bought in good faith, who were bona fide purchasers, supposing that under the law they had the right to take the land, that they shall be protected in their property. If any individual conveys property that he does not have a title to, under the pretense that he has, in equity and in law he is compelled to make it good. The United States had an absolute title to this land, and nobody denied it. It was within the power of the Government to make a good title; yet the officers who assumed to do it acted without the authority which might have been obtained from the legislative department; but supposing they had that authority they made the title. They have taken these people's money, and these holders for fifteen or eighteen years, and in some instances perhaps longer, have paid the State taxes, have held possession of the land, and have believed they were the owners of it.

About 1882 there was a contest raised as to the question whether this was valid or not, and it was generally understood that there was a technicality that might vitiate the title though the patents had issued. Thereupon in some instances settlers went upon these lands for the purpose of making homes, believing that they were bona fide entitled to do so, believing that they did not interfere with the real right of anybody. They made pre-emption and homestead claims on top of the lands which the Government had already issued a certificate for, and in many cases had issued a patent for.

I understand by the amendment accepted by the Senator from Wisconsin [Mr. SPOONER], and offered by the Senator from Michigan [Mr. PALMER], that that class of bona fide settlers are protected.

In addition to this there is not any question but what a large number of people went on these lands for the purpose of getting them for speculation, and not for the purpose of making homes. They did what other people had attempted to do—get the lands for the timber that was on them. That class of men are

not entitled to any protection at the hands of the Government or any consideration whatever.

I shall vote for the amendment of the Senator from Wisconsin as amended by the acceptance of the amendment offered by the Senator from Michigan, which protects every bona fide settler.

Now, then, the question is simply this: Shall we protect the men who supposed that they had a right to take these titles, as the Government said it had a right to make them; who paid their money and took their receipts, and subsequently took their patents and sold to other men, who had the same right to believe in the title, at an advance price—whether these bona fide owners and holders are to be deprived of their lands for the simple purpose of allowing somebody else to come in here and get them—because the moment they are open they will be occupied by some other persons? The Government will derive no great benefit from this transaction, even if it was right and proper, which I deny.

The lands may sell for $25 or $30 an acre, it is said. I do not know exactly where they are. That has nothing to do with the question, in my judgment. If the Government has lured its citizens into buying these lands, they believing that they were entitled to do so, it is an act of injustice on the part of the Government, because it has the technical right, to say because the land has advanced in price that it shall not now be held by those people who, trusting the authorities appointed by law to make the final conveyance, received it. Because they trusted them and took their title, are they now to be despoiled and destroyed of their rights on a mere technicality?

Mr. President, recently under a decision of the Interior Department with reference to land in the vicinity of Denver overruling decisions of the Interior Department made in two cases carefully adjudicated in 1873 and 1874, after the people had been in possession of the land, after they had had a patent from the Government in some instances for fifteen years, the Government of the United States proceeds to institute suit to set aside the patent on the theory that the lands adjudicated by the Government to a certain railroad company had never been the property of the railroad company. The land is worth in some cases $1,000 an acre; and who is to be benefited by that $1,000 an acre? Is it the Government?

Mr. BERRY. Will the Senator allow me?

Mr. TELLER. Not now. The Senator may speak when I get through this illustration.

Is it the Government that is to be benefited? Not at all. The moment it is declared that these are void entries, that moment the land is open under the settlement law, and Mr. Jones and Mr. Smith and everybody else jump on to it, and the man who had cultivated it for fifteen years and who put fences on it and houses on it and had made it a garden, who has held it and paid taxes on it, is deprived of his property that some saloon-keeper who hung around the town and did nothing may go upon it and receive the benefit of the enhanced value by the labor of the former occupant.

What I mean to say is, that when the Government has by its decisions misled its citizens and justified them in buying land of the Government or of a railroad company, the Government, while it is not in law, is in morals and in decency estopped from despoiling its citizens in that way.

Now, I will hear the Senator from Arkansas if he wishes to ask me a question.

Mr. BERRY. The Senator stated that some of this land was now worth a thousand dollars an acre.

Mr. TELLER. Not this land that is in controversy. I spoke of the Denver land.

Mr. BERRY. I want to say to the Senator that a very large portion of this land is not agricultural land; it has no houses and no ditches and no farms upon it. It is mineral land; it is iron land of great value. The Senator says that the Government would not be benefited. The law requires this land to be offered to the highest bidder. If it is offered to the highest bidder to-day it will bring from $25 to $30 an acre, it is said. If there is any reason why these men who purchased in fraud of the law, in the face of the instructions of the Commissioner of the General Land Office, shall be given by this Government the difference between a dollar and a quarter an acre and that which the land will bring at public sale to the highest bidder—if there is any reason why we should donate and contribute this to these corporations and these syndicates that do not occupy the land, I shall be glad if the Senator from Colorado would tell me what that reason is.

Mr. TELLER. I take issue with the honorable Senator. There is not any law that requires the land now in con-

troversy in Michigan to be put up and sold at auction; it is discretionary with the department. They may withdraw it from the operation of the settlement law and put it up. The Senator knows that upon pretty nearly every one of these pieces of land there are now four sticks laid out in the shape of a basement of a house. He knows that there is a little something done upon it by some speculator, and it is not a question whether the Government of the United States is to get what the value of the land is, but it is a question whether somebody else who has not had anything to do with this land up to the present time shall step in and have the enhanced value produced, perhaps not by the labor that these men have put upon it in Michigan, but by the holding of it until circumstances have made it valuable, upon which they have paid taxes for fifteen or eighteen years, and some man who has no claim at all upon the Government, who has never been misled by the action of its officials, who never has paid a dollar in State tax or anything else, or paid for the land, is to come in and take it as a homesteader or pre-emptioner if he sees fit.

Mr. BERRY. The Senator has just admitted that it was in the power of the Department to withdraw it from settlement and offer it to the highest bidder.

Mr. TELLER. So as to the men who bought the land in the vicinity of Denver, who bought it from a railroad company that had a patent to it, and after there had been two determinations in the Department that it was railroad land and not public land, it is in the power of the President of the United States to put up that land that has now enhanced in value, having passed through the hands of half a dozen owners, and sell it for a thousand dollars an acre; but it would be downright robbery if he should do it; and there has not been any President who has ever sat in the chair of Washington who would have thought of doing it. The people of the United States are not so poverty-stricken and so poor that they want the Government of the United States to engage in robbing the citizens. They are willing that the Government should do what any individual would be compelled to do by the decent and respectable people of the community in which he lived, and that is, to make good his contracts and not to resort to technicalities of law. I say that the Government of the United States cannot afford to take from anybody the land it has conveyed to him when the purchaser

believed that he was getting a title from the Government, there being no fraud on his part.

If there was a mistake, what is the rule of equity? That the man who made it must suffer for it, and not the man who acted in good faith. If it was ignorance on the part of the Government officers, then the Government should suffer. If it was fraud on the part of the Government officers, then the Government should suffer and not the citizen, unless the citizen participated in the fraud; and it is only proposed here to treat with the bona fide people, those who acted in good faith.

Now, Mr. President, it may be that you could save fifteen or twenty or thirty thousand dollars of money by these proceedings; it may be that by resuming control of the land I have spoken of that is covered with houses in the city of Denver the Government of the United States can add to its overflowing Treasury; but does the Senator from Arkansas want that done? Does he believe that the constituents who stand behind him want it done? Does he believe the respectable people of this country want it done when it comes out of the pockets of some citizen of the United States who is himself without fault?

Mr. President, money of that kind would be a disgrace to us, and ought to bring misfortune to us as well as to be a disgrace. What we want to do is, if there has been an honest transaction on the part of the citizen with the Government, that that shall be maintained. No government in the world can afford to plead technicalities; no government can afford to say, "The law is against you; you did not know it; but in the mean time I sold you this land; I took your money; I put it in my treasury and have used it; but twenty years later I have discovered a technicality that will enable me to pay you back your money and sell the land to others at an enhanced price."

Mr. President, the very suggestion is abhorrent, it seems to me. If these people took in good faith, then the Government is bound to protect them and to make them a title if it can be made; and the only exception should be cases where there was fraud or collusion with those acting under the Government. Where the honest settler, the bona fide occupier, has gone upon the land and attempted to make title, he ought to be protected, because his interests are paramount to those of the capitalist who put his money in or of the party who

has simply bought, because one or the other must be wrong. But where there is no question of occupation, where it was a fair transaction between the Government and the cash purchaser, there ought not to be any hesitation either in this case or in any other in dealing with the citizen; and that is why the committee provide in this bill that where a railroad company not having the title, not being possessed of the title to the land, attempted to sell the land and did sell it under the supposition that it belonged to the company, the citizen believing it as well as the railroad company, and then it turned out that the railroad company did not own it, the Government shall allow him, contrary to public policy now, to buy the land of the Government and not take it by pre-emption or homestead entry. It is because the Government allowed him to be mislead by its conduct; and if the Government has directly misled him, then much stronger is the case that the Government should protect him.

Not only did the Government in these cases give the certificates, but years afterwards issued the patents. The Senator says that it was in violation of the instructions of the Commissioner of the General Land Office. Why did the Commissioner of the General Land Office subsequently, at a period varying from a few months to several years, issue patents for these lands? The truth was that the whole thing proceeded upon a misapprehension as to the law, and that is all there was of it—a misapprehension as to the law by the purchasers and a misapprehension of the law by the Department. Now, it is said that the Government should take advantage of this mistake of the law and deprive these people of what they supposed and had a right to suppose was their property for the last fifteen or twenty years.

Mr. BERRY. Mr. President, the Senator from Colorado is horrified at the idea that this Government should attempt to take lands because of a mere technicality, and he says the trouble arose from a mistake of the Government. I read six letters—I think there are six—from the Commissioner of the General Land Office at Washington to the local officers at Marquette, telling them again and again, "These lands are not subject to private sale," and in subsequent letters, "You have disobeyed the orders, and I again remind you that they are not subject to private entry." In the face of that the officers at Marquette went on and sold 800,000 acres of these lands,

three-fourths of which were sold to twenty corporations and syndicates, and the same register of the land office is now in partnership with the parties who purchased; and yet the Senator from Colorado says that is a mere technicality, and it would be robbery on the part of the Government to claim the lands. That may be called a technicality in the courts in which he has practiced, but in those in which I have appeared that would be called fraud, and any man who would doubt that these corporations had full knowledge of the fact that the Commissioner of the General Land Office was instructing the local land offices not to sell these lands at private entry—I say the man who would doubt that knows little of the operations of the corporations of this country.

Mr. President, the whole history of land grants to corporations of every character and description has been that in every instance almost the corporation has failed to comply with the conditions contained in the grant. The history of it is that wherever they have secured an advantage by the decision of any court over any poor settler, they have with merciless hand driven him from his home; and yet when they have made a mistake, when they thought they could purchase in the face of the law, when they knew they were violating the law, when this land would have brought thousands upon thousands of dollars if put up at public sale, when these favored individuals were permitted in the face of the law to take it up at $1.25 an acre and now come and make a pathetic appeal to Congress when they have possession of lands said to be worth to-day millions of dollars, the proposition that these men who paid $1.25 an acre for 800,000 acres of land should receive back only the money paid, the Senator from Colorado thinks would be a great hardship, and he seeks to make an appeal to the Senate and to its sympathy in behalf of these syndicates.

I assert that no man can read the testimony taken before the House committee, no man can read the majority report, without coming to the conclusion that in nine cases out of ten these parties had knowledge of the fraud, and they knew they were gambling, they knew they were speculating, and they have no hold upon this land but that they have secured by paying a dollar and a quarter an acre, lands of immense value, and that their hold is uncertain, and the Department having decided against them they

come now and seek to foist it upon a bill known to be popular, a land-forfeiture bill forfeiting lands granted to railroads. They know they can not get their claim through on its own merits, and their only hope is to tack it onto a bill that the whole country is in favor of, and then they hope by that means to confirm a title which was conceived in fraud and which was known to be a fraud at the time it was done; and these lands, as I said, were sold directly in face of the orders of the Interior Department. If it is right to confirm them under the circumstances, then I have said all that I wish.

I repeat that my information comes from the report made to the Congress of the United States. If it is a false report, the men who made it are responsible for it. It comes from testimony taken week by week of witnesses who have sworn to these facts.

I insist that this land-forfeiture bill, which we all protest that we want to pass, ought not to be clogged and loaded down with amendments which will have a tendency to defeat it, and then Senators go before the country and say the Senate of the United States passed the land-forfeiture bill, but the House of Representatives did not agree to it, when they are placing amendments on it which they know that no man who understands that testimony can conscientiously agree to.

Mr. TELLER. I do not know what may be the rule in the courts in which the Senator pleads in Arkansas, but I know what is the rule in the courts in which I have practiced, and that is that there is no fraud to be charged on a party who does not participate in it. It certainly is not so in the higher courts of the United States. No man is chargeable with a fraud who does not participate in it. The Senator does not charge that these cash entrymen participated in fraud.

Mr. BERRY. I assert directly that that report said that three-fourths of this immense body of land was purchased, and that the committee were driven to the conclusion that it was purchased in fraud, and the purchasers must have known it.

Mr. TELLER. That was the impression of the committee without evidence, and my recollection is that there is no evidence which would justify that statement. But if that was true as to a few, what is to be done with the others? No man is chargeable with fraud, I repeat, who himself has not participated in it; and if the Government of the United States puts in a

land office a scoundrel, as it frequently does, and that man proceeds to ignore the instructions of his superior, as is frequently the case, and a citizen is misled in putting his money into a purchase of land, is it any answer when he says "I demand that the Government treat me as an individual would be compelled to treat another individual in any forum of the land," to allege that the land officer committed a fraud without any connection with the party who made the purchase of the land? There is the failure of the Senator's argument. He insists that the settler is responsible for the misconduct of the land officer and the subsequent misconduct (if he is correct) of the Commissioner who proceeded to issue a patent and the President who signed it. Was the President guilty of a fraud? Was the Commissioner guilty of a fraud?

The Senator knows, if he knows anything at all, that this whole proceeding arose from a misunderstanding of the law. There is not any question about it. If there were two men who knew that it was void they went in and bought with their own money a body of land on the supposition that some day the title would be confirmed. They must have been far-seeing men, for it has been a question in the Interior Department until within a very short time whether these were legal and valid entries. It was contended that they were valid most positively by some officers, and it has been only recently that the question has been finally settled.

The Senator from Arkansas can not obscure this question by saying that the amendment is put on here for the purpose of defeating the bill. Why, Mr. President, when did the Senator from Arkansas become the special champion of the people in respect to public lands? I do not want on a bill of this kind to go into a political discussion, but I say that there is, or ought to be, nothing of politics in this case. If there is I am quite prepared to show that the Senator need not throw any stones from that side of the Chamber when it comes to a question of fealty to the settler on the public lands on the part of the administration that preceded the war or the present and those that intervened. If he wants to open up the present administration of public affairs in reference to lands, I shall be quite prepared to meet him on any reasonable bill and at any reasonable time, and if I do not show him that this Administration has done more to unsettle titles and

disarrange business in the West than the value of the millions of money that he claims have been or are likely to be worth to the Government if it was recovered, I shall give up. There is no politics in this bill.

The Senator can not claim that he is more in favor of the repeal of the law that withholds these lands from settlement than I am. Years before I became charged with duty in another department of the Government, on this floor I advocated again and again a repeal of all the grants made to railroad companies that had not been complied with at that time. As an executive officer I submitted three separate reports to the President, in each of which I urged the legislative department of the Government to take immediate steps to free public land from the incubus of a supposed grant.

The Senator need not stand here, nor need any other Senator, and attempt to hurl at me the stigma that I am in the interest of wishing to give to railroad companies or anybody else the public lands, for upon that question I yield to nobody in this Chamber or elsewhere. Ten years ago in this Chamber I introduced a bill that if it had passed then would have saved the country from a great deal of scandal, from a great deal of trouble, and would have saved a great deal of land for settlers that they perhaps will never get. Not only did I put in bills as early as that to forfeit some of these grants, but a bill which would restrict settlement entirely to homestead settlers, more than ten years ago, and upon every occasion I have advocated the preservation of the public lands for the actual settlers. I did not learn that doctrine in a Democratic school, either, but I was brought up to believe not simply that honesty was the best policy, but that it was a duty; and I would no more by my legislative vote here rob a man of that which belonged to him than I would as a private citizen, and I would be ashamed of myself in the community in which I live if I sheltered myself from an engagement of mine under the statute of limitations or any technical plea. I believe in keeping and maintaining not only the spirit of honesty, but honesty itself. I say that the Government having given to these people a title which they believed to be good, it being now in the power of the Government to make good the title, it is absolute robbery, and would be a national disgrace if we did not make good the title to every man who acted in good

faith, and that is the only class of men that we seek to protect by this amendment.

The PRESIDING OFFICER (Mr. HARRIS in the chair). The question is on the amendment proposed by the Senator from Michigan to the amendment of the Senator from Wisconsin.

Mr. BERRY. I move to lay on the table the amendment of the Senator from Michigan to the amendment of the Senator from Wisconsin.

The PRESIDING OFFICER. The Senator from Arkansas moves that the amendment lie on the table.

Mr. BERRY called for the yeas and nays.

Mr. PALMER. Will the Senator from Arkansas withdraw his motion for a moment ?

Mr. BERRY. I withdraw the motion.

The PRESIDING OFFICER. The motion is withdrawn.

Mr. PALMER. To my clouded intellect there seems to be a great deal of irrelevant talk. An outsider would hardly appreciate what we are talking about. I know that this discussion may take a very wide range upon the amendment of the Senator from Wisconsin; but what is under discussion now? It is my second amendment to the Senator's amendment, and it reads thus :

Provided, That nothing herein contained shall be construed to confirm any private entry for land heretofore settled upon and now claimed under color of the homestead and pre-emption laws; but in all such cases the Commissioner of the General Land Office and Secretary of the Interior shall hear and determine the claims of the parties respectively, according to the provisions of existing law.

It is one of the difficulties of my situation, Mr. President, that I was not trained in the law; and again, if I have a legal conviction, or a legal idea, I have not that technical phraseology and those sententious phrases that convince the groundlings (in which I include myself) and people who are not well versed in the law. I cannot see why by reserving this right to the settlers and homesteaders we are doing an injury to the cash-entry men, save taking away from them what is not legally theirs, and then we leave them the resort to the courts. I believe in confirming all these cash entries where there is no conflict. I will not say that there is

any fraud in the entries among the purchasers. It is very evident, though, that a great many purchases were made with the conviction that they were buying into a pool; in other words, a gamble; and here is one of the evidences that I submitted yesterday from one of the parties who purchased, and it will speak for itself. This was Mr. A. C. Brown, a very respectable man.

Q. Did you have any talk with other parties living there, on the subject of those lands being reserved from the market?

* * * * * *

Question repeated.

A. Yes.

Q. With whom?

A. It was a subject of general conversation.

Q. State to the committee whether or not it was generally known there among men dealing in the lands that these lands were within what was termed a lapsed railroad grant?

A. I think it was at that time.

Q. Afterwards you say that in 1880 you did buy some of the lands?

A. Yes, sir.

Q. At the solicitation of young Mr. Selden?

A. Yes.

Q. You bought them knowing the situation did you?

A. Yes.

* * * * * *

Q. Did you expect to hold that land?

A. I was willing to take my chances of it.

That is scandal, I have no doubt. I am not talking of the legality or the weight of this in a court. I am merely stating that these men, who all bought in good faith, are not idiots. There undoubtedly were some of them innocent purchasers; but most of them knew that they were buying into an uncertain thing, and they were willing to take the chances, just as Mr. Brown says. Now, I am willing to give my vote toward the confirmation of all lands where there is no conflict by bona fide settlers. But the settlers have fought this fight for the last eight years. They have got certain rulings in the Department, and they are suspicious of all these amendments. As I said in regard to the canal discussion, I fear—and here I merely repeat—the Greeks bearing

gifts. I do not pretend to call my friend from Wisconsin [Mr. SPOONER] a Greek at all, but that is the way it phrases. If we can protect them by the most stringent amendment that we can adopt, I am in favor of doing it.

The Senator from Wisconsin said yesterday:

Now, when it is asked that Congress shall go beyond that—

That was my first amendment:

That nothing herein contained shall be construed to confirm any sales or entries of land upon which there were bona fide pre-emption or homestead claims on the 1st day of January, 1888, arising or asserted under color of the laws of the United States.

The Senator said:

Now, when it is asked that Congress shall go beyond that, I beg leave to say to the Senator from Michigan, with all due respect to him, that the proposition is subject to the just suspicion that it is the purpose to ask Congress to legislate, not on broad principles which shall fairly take in and protect all who ought to be protected, but under such specious guise or disguise to legislate for particular cases, the merits of which the Senate do not understand.

That is what we are all the while suspecting on the other side.

Mr. BLAIR. Will the Senator allow me to ask him a question?

Mr. PALMER. Any number.

Mr. BLAIR. I should like the Senator to explain the difference between the amendment first read, and which the Senator from Wisconsin [Mr. SPOONER] was willing to have incorporated in his amendment, and the amendment the Senator from Michigan is now moving.

Mr. PALMER. Please repeat the question, I ask the Senator from New Hampshire.

Mr. BLAIR. The Senator moved this amendment, which was accepted by the Senator from Wisconsin:

That nothing herein contained shall be construed to confirm any sales or entries of lands upon which there

were bona fide pre-emption or homestead claims on the 1st day of January, 1888, arising or asserted under color of the laws of the United States.

That was accepted by the Senator from Wisconsin. Now the Senator from Michigan moves this amendment:

Provided, That nothing herein contained shall be construed to confirm any private entry of lands heretofore settled upon and now claimed under color of the homestead or pre-emption laws, but in all such cases the Commissioner of the General Land Office and the Secretary of the Interior shall hear and determine the claims of the parties, respectively, according to the provisions of existing law.

Now, I wish to ask the Senator whether there be any distinction or difference between those two amendments save this, that in the last he leaves out the words "in good faith" or "bona fide," and also that he extends the time from the 1st of January, 1888, down to the passage of the act? Is there any other difference?

Mr. PALMER. I should think there was a very great difference. If the Senator will commence on the third line of the last amendment, at the words "but in all such cases," he will see quite a difference.

Mr. BLAIR. That is in the fourth line of the printed amendment.

Mr. PALMER. Where the words occur—

But in all such cases—

At this point the hour for unfinished business arrived, but after some discussion unanimous consent was obtained to proceed with this bill, with a view of disposing of it, if possible, on that day (p. 4014).

Mr. PALMER. This is the vital part of the second amendment:

But in all such cases the Commissioner of the General Land Office and the Secretary of the Interior shall hear

and determine the claims of the parties, respectively, according to the provisions of existing law.

I do not understand that that concludes any parties from appealing to the courts after they get through there if they are dissatisfied; but the point of it is that the homesteaders have fought their fight in the Department, and now they do not wish to have it all undone by the amendment, as it would be, of the Senator from Wisconsin. I, not being a lawyer, can not tell what the legal effect of that would be, but I know how lawyers can construe language. They do not want to be relegated to the commencement of that old fight, although I have no doubt that if they had money enough to keep it up they would succeed in the end. They want to have a chock put under the wheels, and not be put down to the foot of the hill again; they have got really to the top. That is the whole animus of my second amendment.

Mr. BLAIR. What is the reason that the words "bona fide," in the first amendment, or "in good faith" are omitted in the second? Why not insert in the third line of the second amendment after "claimed," the words "in good faith" or "bona fide claimed?" What objection could there be that the two amendments should be alike in that respect?

Mr. PALMER. How would the Senator introduce it?

Mr. BLAIR. Let the second amendment read in this wise:

That nothing herein contained shall be construed to confirm any private entry for land heretofore settled upon and now claimed in good faith under color of the homestead or pre-emption laws.

Mr. PALMER. I see no objection to that.

Mr. BLAIR. Then another point. The second amendment covers time down to the passage of the bill. The first amendment covers the time to the 1st of January last.

Mr. PALMER. I gave my reasons yesterday why I introduced the amendment with this change of phraseology which withdrew that element of limitation of time, and that was this: I received a telegram from Mr. Hopkins, who is a very respectable man, as follows:

BEAR LAKE, MICH., *6th.*

TO THOMAS W. PALMER:

Don't exclude pre-emption and homesteads taken since January 1. Hundreds of homes have been made since.

GEO. W. HOPKINS.

Those men have gone on under the decisions of the Department. They have had greater reason for going on than any cash entryman ever had for supposing that the lands were in the market. They have had continuous decisions and rulings of the Department, and I say that they should not be limited as to time.

Mr. BLAIR. In other words, the Senator claims that there have been men who have homestead and pre-emption claims arising in good faith since the 1st of last January.

Mr. PALMER. Certainly. That limitation was withdrawn, because I got a telegram yesterday morning stating that the homesteaders were going on encouraged by the decision of the Land Office in Wakefield *vs.* Cutter, which ruled that "the cash entries on odd sections were absolutely void." I think that was on the 6th of last January. When we talk of these cash entrymen being invited to purchase these lands, even conceding it to be so, they have not had the encouragement to purchase these lands that the homesteaders have had to go and settle upon them. They have had not only decisions of the courts, but rulings of the Land Office.

Another thing in regard to the cash entrymen. They do not deserve the consideration that they should have if they had shown due diligence; but fifteen years ago, in the case of Eldred *vs.* Sexton, it was decided that their titles were not valid, and yet they have not taken any steps before Congress to have them validated except in some such way as this. That is all there is to the case.

After some discussion it was agreed to amend by substituting the "1st day of May," for the "1st day of January."

Mr. SPOONER. Now, the proposition of the Senator

from New Hampshire, as I understand it, is to amend that amendment by striking out the word "January" and inserting in lieu of it the word "May," so that it shall provide that this confirmation shall not be operative to confirm any title that comes in conflict with a bona fide pre-emption made prior to the 1st day of May, 1888.

Mr. PALMER. That is my first amendment accepted by you.

Mr. SPOONER. Yes.

Mr. PALMER. That is all right. My second amendment is further up, on page 3979 of the "Record."

Provided, That nothing herein contained shall be construed, etc.

Does the Senator from New Hampshire want to amend that?

Mr. BLAIR. I understand that the Senator from Wisconsin, as has been stated several times, adopted that first amendment.

Mr. PALMER. And he accepts it as amended.

Mr. BLAIR. Commencing—

That nothing herein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of January, 1888.

Now substitute for "January" "May."

Mr. PALMER. That was all finished, but that is not the amendment under discussion. That comes in by a side track. I insist on my amendment:

Provided, That nothing herein contained shall be construed to confirm any private entry for land heretofore settled upon and now claimed under color of the homestead or pre-emption laws; but in all such cases—

Here is the point of it—

the Commissioner of the General Land Office and Secretary of the Interior shall hear and determine the claims of the parties respectively, according to the provisions of existing law.

And my explanation is this: They do not want to have that fight to go over again. They have fought the good fight and I hope they have finished their course, but with that left out they will not feel so.

Mr. SPOONER. Now, while the Senator from Michigan talks a good deal about his not being a lawyer, I have very little sympathy for him in that respect, for I venture the assertion that he has presented no amendment to this bill that has not been drawn by a very good lawyer.

Mr. PALMER. Will the Senator permit me to interrupt him?——

Mr. SPOONER. Certainly.

Mr. PALMER. The second amendment was neither instigated, suggested, nor reviewed by a lawyer, the one that I have substituted the last for. That was drawn by a horny-handed son of toil.

Mr. SPOONER. But how about this?

Mr. PALMER. It was drawn by a lawyer, I hope.

Mr. SPOONER. The Senator says it was drawn by a lawyer. I do not think any lawyer reading it would hesitate to come to that conclusion.

I only wish to make one remark in regard to this amendment, and then I shall have no more to say on this subject.

The amendment which I have accepted was correctly stated by the Senator from Colorado [Mr. TELLER] and the Senator from New Hampshire [Mr. BLAIR] as protecting adequately every bona fide settler or pre-emption claimant down to January 1, 1888. This amendment which is now offered, and which was drawn by some lawyer, leaves out the words "in good faith," and the effect of it is simply to exclude from this confirmation every claim on every tract of land upon which up to the time of this act passes there shall be a squatter, whether he has squatted in good faith or in bad faith——

Mr. PALMER. Will the Senator permit me to interrupt him?

Mr. SPOONER. Through fraud or otherwise.

Mr. PALMER. To show him my good faith.

Mr. SPOONER. I do not question your good faith.

Mr. PALMER. I accept the amendment to insert "good faith" and the limitation of time.

Mr. SPOONER. That is, "January" is changed to "May."

The PRESIDENT *pro tempore*. The proposed modifi-

cations to the amendment will be first reported at the desk to avoid confusion. The Chair understood that some modifications had been agreed upon and accepted by the Senator from Michigan.

Mr. PALMER. To facilitate business, I will say, for the information of the Secretary, that in my first amendment the "first day of January, 1888," is changed, by common consent, to the "first day of May."

The PRESIDENT *pro tempore*. Let that be reported.

Mr. SPOONER. I beg the Senator's pardon. I agreed to accept that amendment if the second amendment which he now proposes was withdrawn.

Mr. PALMER. Then that can be considered undone.

Mr. DOLPH. I move to lay the amendment of the Senator from Michigan to the amendment of the Senator from Wisconsin on the table.

The PRESIDENT *pro tempore*. The Senator from Oregon moves to lay upon the table the amendment proposed by the Senator from Michigan to the amendment offered by the Senator from Wisconsin.

Mr. PALMER. I should regret to have that done.

The PRESIDENT *pro tempore*. The Chair must remind the Senator from Michigan that the motion is not debatable.

Mr. PALMER. I would merely say that if the motion should be adopted I should have to vote against the Spooner amendment.

Mr. BLAIR. Am I to understand that this is a motion to lay the amendment of the Senator from Wisconsin on the table?

The PRESIDENT *pro tempore*. To lay the amendment proposed by the Senator from Michigan to the amendment proposed by the Senator from Wisconsin on the table.

Mr. PALMER. Will the Chair please state the question again?

The PRESIDENT *pro tempore*. The Senator from Oregon moves that the amendment proposed by the Senator from Michigan to the amendment proposed by the Senator from Wisconsin be laid upon the table.

Mr. BLAIR. I should like to know what that amendment is.

The PRESIDENT *pro tempore*. It will be read by the Secretary, though that can be done only by unanimous consent, the motion not being debatable and the read-

ing being in the nature of debate. The Chair hearing no objection, it will be read.

The SECRETARY. At the end of the proposed section 9, the amendment is to add:

Provided, That nothing herein contained shall be construed to confirm any private entry for land heretofore settled upon and now claimed under color of the homestead or pre-emption laws; but in all such cases the Commissioner of the General Land Office and Secretary of the Interior shall hear and determine the claims of the parties respectively, according to the provisions of existing law.

Mr. BLAIR. By unanimous consent I wish to say that that is not the amendment of the Senator from Michigan, as I understand.

Mr. PALMER. The Senator from New Hampshire is mistaken. That is my amendment.

The PRESIDENT *pro tempore*. Debate is not in order. The amendment just read is the amendment offered by the Senator from Michigan, as the Chair understands and is informed by the Secretary.

Mr. SAWYER. I understand that the first amendment that was offered by the Senator from Michigan to the amendment of the Senator from Wisconsin was accepted and is part of my colleague's amendment. Is it not?

The PRESIDENT *pro tempore*. The Chair so understands.

Mr. PALMER. That is the status of the case.

The PRESIDENT *pro tempore*. The question is on the motion of the Senator from Oregon to lay on the table the amendment proposed by the Senator from Michigan to the amendment of the Senator from Wisconsin.

A vote was taken, by yeas and nays, and the amendment of Senator Palmer was laid on the table (pp. 4015, 4016).

Motion was then made to lay the amendment of Senator Spooner on the table, which the Senate refused to do by a yea and nay vote (p. 4017).

A vote was then taken on Senator Spooner's amendment, and it was agreed to (p. 4017).

After action on several other proposed amendments, the bill was reported to the Senate, as amended, and the following proceedings were had (Cong. Record for May 9th, 1888, pp. 4022–4026).

Mr. HOAR. I desire to have the amendment adopted as in Committee of the Whole on the motion of the Senator from Wisconsin [Mr. SPOONER] reserved for a separate vote.

The PRESIDENT *pro tempore*. The amendments will be separately stated and voted upon.

Mr. BLAIR. I ask that all the amendments, with the exception of the one specified by the Senator from Massachusetts [Mr. HOAR], be voted on in gross.

The PRESIDENT *pro tempore*. That there may be no mistake the reserved amendment will be read by the Secretary.

The CHIEF CLERK. The Senate, as in Committee of the Whole, inserted, as section 9, the following:

That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States, by sales or entries, by cash warrants or scrip, under color of the public-land laws, and where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: *Provided, however*, That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States.

That nothing herein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted under color of the laws of the United States.

The PRESIDENT *pro tempore*. If there be no objection

the amendments made in Committee of the Whole, other than the one just read, are concurred in in the Senate. The question recurs on concurring in the amendment just read.

Mr. HOAR. I move to amend that amendment by striking out in the sixth line the words "by sales or entries, by cash warrants or scrip," and by inserting in the seventh line, after the word "laws," the words "or under State selections or."

The PRESIDENT *pro tempore*. The amendment of the Senator from Massachusetts will be stated.

The CHIEF CLERK. In the sixth line of the amendment it is proposed to strike out the words "by sales or entries, by cash warrants or scrip," and in line 7, after the word "laws," to insert "or under State selections or;" so as to read:

SEC. 9. That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States, under color of the public-land laws or under State selections or where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: *Provided, however*, That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States.

Nothing herein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted under color of the laws of the United States.

Mr. HOAR. That extends the principle of the amendment to all cases, and only to those cases, where there have been purchases under the authority of an officer of the United States, and where the Secretary of the Interior finds that the purchase has been made without

fraud and in good faith and the Government has received and retains the consideration.

The PRESIDENT *pro tempore*. The question is on the amendment proposed by the Senator from Massachusetts to the amendment.

Mr. BERRY. I ask the Senator from Massachusetts whether, if his amendment shall be adopted, it will have the effect of confirming the canal selections, the lands selected by the canal company, and if it is not in effect the same amendment he moved in Committee of the Whole and which was laid on the table upon a former day?

Mr. HOAR. It will have the effect to confirm the lands held by the canal company or persons claiming under them, if it shall turn out that that land was conveyed to the canal company by an officer of the United States; further, that the United States received the consideration and now holds it; and, further, that the title was obtained in good faith and without fraud; and I am at a loss to conceive how any man born with a capacity for the sense of justice, undertaking to act in a legislative capacity in the interest of the whole people, can refuse to confirm a title which depends upon such facts.

Mr. BERRY. Mr. President, I am at a loss to conceive how any one born with a sense of justice and right can think that it is proper for a legislative body to undertake to confirm selections of lands, not only to the canal company but to cash purchasers, where the evidence taken shows, and a majority of the committee report, that the lands were selected in fraud; that these persons were parties to the fraud; that the purchases were without consideration, and that these parties have already received many times the value of the canal constructed.

The amendment of the Senator from Wisconsin says that it shall only apply to those lands which were selected without fraud. I assert again, as I asserted this morning, that the Secretary of the Interior will be the judge to determine this, but the evidence as to whether or not they were selected or purchased in good faith will be furnished only by the parties in interest, and it practically amounts to confirming to the canal company and to the cash purchasers an immense body of land. That is the reason why I do not agree to the proposition.

Mr. PALMER. I ask to hear the amendment read.

The PRESIDENT *pro tempore*. The amendment will be again read.

The Secretary read the amendment of Mr. HOAR to the amendment made as in Committee of the Whole.

Mr. PALMER. If that is what I think it is I am astonished that the Senator should return to the attack again. This, I suppose, confirms the canal selections. It was a nefarious transaction—I will not say from beginning to end, because there may be some very respectable people in it collaterally—but the manipulations of the selections, the removal of an honest officer, the putting in of a pliant tool, the utter defiance of law, the misconstruction of law, the defiance of law in every respect—this is one of the cases where all those terms will apply. They have taken mineral lands when it was expressly declared that they should not take mineral lands. They were confined to the lands nearest the canal, and they left a hiatus of 100,000 acres, and there it is. It seems as if [pointing to a map of the upper peninsula] Providence had come to my relief. There [exhibiting] is the map displaying just the manipulation and maneuvering of that canal company. Here are concentric circles showing——

Mr. DOLPH. If the Senator from Michigan will permit me, I ask him if it is not true that the 15,000 acres in controversy here were part of the second grant, so that there is no question of the location of the land at issue at all?

Mr. PALMER. I do not think that is so material.

Mr. HOAR. What did you say it for?

Mr. PALMER. Because I wanted to pile Pelion upon Ossa. I was a little cumulative. Now the idea; after this has taken up two or three days of the time of the Senate, to throw and inject in the last day, in the afternoon, such a proposition, surprises me. If it was by any one else than the Senator from Massachusetts, or a Senator, I should feel as if I should characterize it in very strong terms. As it is now, I am confined to the assertion that that canal company should receive no favor, except at the hands of a court and in due process of law. Let them have what they can get, but do not let the United States Congress confirm a single acre which they have gotten surreptitiously.

Mr. HOAR. Mr. President, the Senator from Michigan concedes away his whole case. Here is an amendment which provides for the confirmation only of lands which were sold and selected by the officers of

the United States, which were received in good faith and without fraud, and for which the United States has received and now retains the consideration. And he says that describes the selections of the canal company. If it does his other statements are absolutley contradicted. And upon what do those other statements rest? They rest upon a report of a committee which was drawn and written, as a member of the Senate, the Senator's colleague [Mr. STOCKBRIDGE] knows, by a person whose fraudulent conduct has been exposed here over and over again, the person who got people to go onto the lands which belonged to this canal company (the only flaw upon their title being that they were selected on lands of an unearned railroad grant which had not been declared forfeited under the old law), lands selected with the approbation of the Secretary of the Interior and under the opinion of the Attorney-General.

This man got a number of persons to go on the lands and make fraudulent entries, and make contracts with his firm to give them an interest and then to swear that those contracts never had been made; and here in this debate the affidavits of those two partners were presented, one of them swearing that the letters were written in which it was said they would hold these men by their perjury to do their further bidding, but that they were written by his partner and not by him, and denying that the contracts were actually made, and the partner coming in with his affidavit and saying that the contracts were made, and he left the firm so as not to induce men to commit perjury; and that is the man who has been furnishing material to the Senator from Michigan nearly all through this debate, as I am credibly informed, and it is upon his authority and the authority of a report made by a divided committee in the House of Representatives that this act of gross injustice is sought to be carried through, that report being written by the very senior partner of that fraudulent firm.

Mr. PALMER. Nothing could more clearly betray the poverty of the case.

MR. HOAR. I though I was giving way for a question?

MR. PALMER. The intention was to ask who furnished the briefs for the Senator's remarks?

Mr. HOAR. The information for my remarks, Mr. President, was furnished to me first by Hon. Benjamin Beall, of Boston, late a member of the House of Repre-

sentatives, and counsel for this canal company, a gentleman of high character and standing, a Democratic member of the House of Representatives, known probably to half the Democratic side of the House. More recently the statements were furnished by a gentleman by the name of MacGowan, who is the counsel for Mr. Malvern and a body of citizens of wealth, property, and character. Mr. MacGowan was formerly a member of the House, a gentleman of high standing and character in his profession, and the present owners of this canal company's rights are among some of the best known and most respectable people in the State of Massachusetts. My colleague [Mr. ALLEN] of the other House came to my seat this afternoon to tell me about his neighbors in the city of Lowell. They took the rights of this canal company when it had failed. They raised a million dollars of hard cash and completed the canal, and proceeded to perform all the conditions.

When this matter was first voted down it was voted down on the statement of the Senator from Michigan and of members of the committee that they would simply forfeit the lands and would not enter upon the question of confirming any of them. There was some sense in that. They would leave that to the future. They put in an amendment which I agreed to, leaving that and saying this bill should not touch it. But now you have an amendment confirming all the other titles you can think of in regard to which there are technical defects. You have confirmed the titles in the State of the Senator from Mississippi, the homesteaders; you are confirming by the amendment of my honorable friend from Wisconsin the homesteaders and cash entrymen for whose interests he has an especial concern; and now you are going to leave out of this bill and forfeit the rights of these people who, as I said, have earned their rights and have performed all the conditions imposed on them by law.

The Senator talks about fraud, and when asked what he means by fraud he says they selected mineral lands when they had no right to select mineral lands. That has been answered over and over again. They selected lands in which were afterwards discovered iron mines, and the opinions of two Attorneys-General have been read in this debate showing that iron mines are not mineral lands within the meaning of our land laws.

Then the Senator said, and he has undertaken to re-

peat it now within two minutes when the Senator from Oregon put him the question, that they went away from the neighborhood of their canal. The answer to that is that there was a second act of Congress. Finding that there were not lands sufficient to build the canal under the first grant, there was a second act of Congress giving them an additional 200,000 acres and authorizing them to go anywhere within the upper peninsula of Michigan; and the 15,000 acres here in controversy were selected under that, and that was done after the opinion of the Attorney-General was taken that they might go there, and under the direction of the Secretary of the Interior.

Now, how idle to keep up this parrot cry of "fraud!" "fraud!" "fraud!" The answer to the whole thing is that this amendment so carefully prepared by the honorable Senator from Wisconsin remits all these questions to the decision of the future:

Shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States.

And the former part of the amendment limits it only to the cases of lands of which the proper officers of the United States made disposition.

It may be that the Senate sits to perform these high acts of legislation; in my own State we call the highest legislative body of that State "the general court;" and it was the understanding of our ancestors that men charged with legislative functions have also the duty, the obligation, and the responsibility in dealing with the great interests of citizens that come before them which rest upon judicial officers; and I say it is a burning shame, it degrades the character of the Senate itself, when citizens come here over and over again with a claim like that I have stated and the Senate turns its back on account of these demagogic cries which are attempted to be made, and especially when the Senate turns its back on them when the concoctors of these frauds are sitting in the gallery inspiring the attack.

The Congress of the United States granted 200,000 acres of land to pay the men who should build this canal, so essential to the commerce of that stormy and

dangerous coast on that lake, and it was built; and by a second act it was declared that this land might be selected, as I have said, anywhere in the upper peninsula of Michigan; and it was said also that the land should be selected by an officer appointed by the Secretary of the Interior, and the selections should be confirmed by the Secretary; and in every single instance the facts upon which these titles depend were submitted to the Attorney-General of the United States by the Secretary of the Interior, and they had the approbation of both those high officers; and the only flaw, the only possible defect that the ingenuity of man can conjure up in the title of this canal company is that an old railroad grant had been made, the railroad never having earned the lands, it being supposed, until the Supreme Court decided otherwise, it being held by the Attorney-General of the United States and by the Land Office, that when the railroad company had forfeited its land by failing to complete its road those lands were open to selection by other grantees; and it turned out ten years afterwards that because this old sleeping railroad title was still there, never earned, giving no rightful property to the railroad company, therefore the selection of these lands were invalid.

Mr. GEORGE. May I be allowed to ask a question?

Mr. HOAR. Certainly.

Mr. GEORGE. Does the Senator wish to be understood as saying that the only reasonable objection to the validity of the grant to the canal company is that some of the lands are located upon lands which had been granted by an act of Congress to a railroad company and not earned by that railroad company?

Mr. HOAR. I do mean exactly that thing.

Mr. GEORGE. And that before the decision in Schulenberg *vs.* Harriman the land officers of the United States recognized the law to be that on the mere failure of the grantee, the railroad company, to comply with the conditions of the grant the grant was forfeited, and acting on that theory permitted the canal company to take up these lands? Is that the interpretation?

Mr. HOAR. I mean to say exactly that thing, and I mean to add to exactly that thing that the governor of Michigan, to which State this land had been granted for a railroad, made a release to the United States.

Mr. GEORGE. Has the canal company complied with all the conditions of the grant to it?

Mr. HOAR. The canal company complied with all

the conditions, and the governor of Michigan so certified. Now, Mr. President, I undertake to say that there is not a member of this body, who, having made a grant of land which had failed to his grantee by such a defect, would go home and look his neighbors in the face if he was not ready and eager to do everything that lay in him to confirm it; and is it true that this great, proud, strong, rich American people has a less keen sense of honor than that which dwells in the breast of the very humblest of its legislative servants?

Mr. GEORGE. Now I desire to ask the Senator from Massachusetts another question. Is the sole effect of the amendment which he has offered, and which is now pending before the Senate, to secure to this canal company the lands which I have referred to in the former colloquy I had with the Senator?

Mr. HOAR. That is the sole effect, and that is upon the condition expressed by the clear statement of the Senator from Wisconsin, that the Secretary of the Interior shall be satisfied that they "have heretofore been disposed of by the proper officers of the United States," and that the parties "have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States."

Mr. PALMER. I think nothing shows the poverty of the case of the honorable Senator from Massachusetts as much as the fact that he has got a phantom that he fights, and that phantom is some lawyer who is stuffing me with information. He does not controvert the facts; at the same time he concedes that attorneys are filling him with information. As a matter of course we have to get our information from somewhere; but in addition to the information I get from attorneys I bring in reports of the House of Representatives, and I was about to have them read the other day and I handed them to the Senator from Massachusetts.

Mr. HOAR. Will the Senator indulge me?

Mr. PALMER. Always.

Mr. HOAR. I should like to ask in the presence of the Senate the honorable Secretary of the Interior of the last administration, the Senator from Colorado [Mr. TELLER], if he does not know these facts that I have stated, if he does not know them on examination, thorough official examination, to be true?

Mr. PALMER. There were so many that the Senator should specify which one.

Mr. HOAR. The whole statement of the case.

Mr. PALMER. He would hardly like to commit himself to all of the Senator's statements.

Mr. TELLER. I have not had occasion to examine this canal question for some time. It has been very thoroughly examined from time to time, and was while I was in charge of the duties of Secretary of the Interior. I think the statement made by the Senator from Massachusetts is substantially correct. Those are the facts as I understand them and remember them.

Mr. PALMER. Will the Senator please recapitulate those facts concisely so that we shall know. There were so many facts stated.

Mr. TELLER. I will wait until the Senator gets through.

Mr. GEORGE. I desire to ask the Senator from Michigan a question.

Mr. PALMER. Certainly.

Mr. GEORGE. I desire to ask the Senator from Michigan whether he controverts the statements made by the Senator from Massachusetts, and if he does, to what extent does he differ with him on the facts?

Mr. PALMER. I cannot say whether I can controvert them, but I will try. If I had the RECORD here to know exactly what the Senator said, I could talk more consecutively and more understandingly.

If he says that the only fault of the canal company was that they unintentionally took lands not thinking them to be mineral, and they afterwards turned out to be mineral, I shall not try to contradict him at all. I will merely read from the report of the Commissioner of the General Land Office. The best way is to be sustained by documents, and I am only sorry that I have not the current literature here to-day. I supposed the fight was off, and therefore I did not bring up four or five reports showing the nefarious character of this whole canal operation. I will say here, and I say it from——

Mr. GEORGE. "Nefarious," did the Senator say?

Mr. PALMER. N-e—nefarious. I will say that the canal never was completed within the specifications of the Department; that now those arms or piers which were to have afforded a harbor or refuge are not of such a character as to be anything but a damage to navigation, and we shall come before Congress and ask for $300,000 to get this canal out of the hands of that company so that we may make it a practical benefit to navigation on the Lakes. I do not think they have rendered an equivalent.

Mr. GEORGE. Was the canal built according to the terms of the act under which the lands were granted?

Mr. PALMER. I think I can say not with positive certainty, and I will have the literature to fortify me to-morrow morning.

Mr. HOAR. I ask the honorable Senator if he, his colleague, has not stated that that canal was completed, and that he went through it himself on the largest steamers.

Mr. PALMER. I think I have heard him say that, and I have heard the Senator from Massachusetts say so a great many times. I do not say they intentionally misrepresent, but I know that such is not the fact. I will place my word against both.

Mr. TELLER. I should like to ask the Senator a question. In the first place does the Senator claim because the land proved to be iron land that it was without the grant?

Mr. PALMER. No, sir. I claim that it was without the grant because it was designated as mineral land, and I can show the reports sustaining that.

Mr. TELLER. I do not think the Senator can sustain that from the Department.

Mr. PALMER. I am merely taking the Department's reports.

Mr. TELLER. That iron land is mineral land within the meaning of the grant?

Mr. PALMER. It was never supposed to be iron land until long after.

Mr. TELLER. If it had been iron land it would not have been excepted from the grant.

Mr. PALMER. Some of the finest copper mines in the world were developed on the margin of this grant.

Mr. CHACE. Right here will the Senator yield to me?

Mr. PALMER. Yes, sir.

Mr. CHACE. I want to ask the Senator from Michigan a question. I want to know distinctly whether he says that those copper mines are on this very property or not?

Mr. PALMER. Yes, sir.

Mr. CHACE. They are on this property?

Mr. PALMER. You mean the property we are talking about?

Mr. CHACE. Yes.

Mr. PALMER. No; I think not.

Mr. CHACE. Then I ask the Senator if that bears on this question?

Mr. PALMER. Not at all.

Mr. GEORGE. Are the mineral lands involved in the amendment proposed by the Senator from Massachusetts?

Mr. PALMER. There is a large quantity of iron lands, but I understand from the former Secretary of the Interior that iron lands are not considered as mineral lands. I am perfectly willing to be fair. I do not want to obscure this question by a lot of collateral issues, as seems to be the desire of the other side. But what I say is that the Senate should not want to do anything or ought not to do anything towards confirming lands gotten in violation of law, even although the particular lands I speak of may not have been so gotten, and where they render no equivalent I say that we ought not to confirm their title.

Mr. GEORGE. What is the specific violation of law through which these lands were gotten?

Mr. PALMER. These lands that I speak of now?

Mr. GEORGE. The lands referred to in the amendment proposed by the Senator from Massachusetts. We are talking about them.

Mr. PALMER. I do not think that there is any particular violation of law about them.

Now, Mr. President, I hope that this amendment of the Senator from Massachusetts will not prevail. If you want to know anything more about the canal company—I dislike to use epithets; I do not want to hoist any red flag in the way of some agent who is pressing the canal claim in season and out of season—this canal company, not satisfied with having one or two lawyers, has had as many as seven ex-members of Congress who have had access to the floor. This canal company can take care of its own interest without coming here as a supplicant to ask us to confirm an irregular selection.

They knew they were violating the law. They have had able counsel all the time while they were going in upon this railroad reservation. To-morrow morning, if this shall be continued, I can give a little more history of the canal company.

I will say this now: That the canal has never been completed within the specifications; that, notwithstanding my colleague says that the largest vessels can be floated through it, I think I risk nothing in saying

that he is mistaken, that he has not been through it within two or three years.

Mr. HOAR. The governor of Michigan has given his certificate.

Mr. PALMER. Which one?

Mr. HOAR. Governor Bagley.

Mr. PALMER. He has been dead several years.

Mr. HOAR. Now, my honorable friend will pardon me. I think this country is entitled to have each one of these facts understood. The Senator from Michigan says that this canal is not completed. My information is that it is completed. The Senator's colleague says that it is completed and he has been through it on the largest steamers. Now, I ask the Senator this question, whether the law did not make it the duty of the governor of his State to inspect the canal and certify whether it was complete, and whether he did not make that certificate—a governor of high character, Governor Bagley? The Senator answers and says he has been dead some years.

Mr. PALMER. I owe the Senator an apology. I thought he was asking in the present tense. He was speaking of the present condition of the canal, and I thought he was bringing to bear Governor Bagley's assertions on that point, and I was surprised when he said Governor Bagley. That was all. I did not mean to cover the thing with derision at all; but the canal has never been completed, notwithstanding the assertions of my very respected colleague, for whom I have the highest regard. I do not think he will reiterate, against my assertion, that the largest vessels can go through the canal.

Mr. STOCKBRIDGE. The Senator will excuse me. I asserted this, and I reassert it, that the Portage Lake Canal was built, according to the certificate of the governor of Michigan, in accordance with the act authorizing its construction. Governor Bagley, of Michigan (whose word was always good in Michigan, and the people of Michigan had the greatest confidence in him as a careful, conscientious man), took a competent person with him, visited the canal, inspected it, found it was completed in accordance with the act granting lands for its construction, and so certified. Now, I think I am right in saying that if he made a mistake and it was not exactly completed in accordance with the contract, that would be immaterial. It was not so; but

if it had been, I think the certificate of the completion of the canal was conclusive upon that point.

That canal was built and completed and accepted, I will not say how many years ago, but twelve or fifteen, perhaps more, perhaps sixteen or seventeen years ago. The piers extending into the lake were built, like all the works, or nearly all the works on our Great Lakes, of wood. They were timber piers, such as were required by the contract. It may be possible, in fact I believe it is true, that those piers have gone somewhat to decay, that while those piers extended into Lake Superior to get sufficient depth of water, I think 13 feet, to comply with the requirements of the contract as certified to by the governor, in the course of years they have gone to decay, the sand has accumulated, as it it does at the end of all piers constructed on the lakes, as any gentleman familiar with them knows, and from time to time it is necessary to change them. The fact that the canal is not in as good order now as it was and will not pass vessels drawing the same amount of water that it did when it was completed has no effect upon this question at this time. The canal was undoubtedly constructed in accordance with the contract; the certificate provided for was given by the governor, and as a matter of law is final.

I want to say further, while I am upon my feet—I did not propose to be drawn into this matter, and I dislike very much to differ with my honorable colleague on such a subject, and I am only led to do so when it seems to be absolutely necessary—I want to say that there never would have been any question as to the title to the lands which the amendment of the Senator from Massachusetts seeks to confirm, the 15,000 acres, had it not been that those lands were within the limits of an old railroad grant, and I desire to say only two or three words on that point.

The grant within the limits of which these lands are situated was made to the State of Michigan in 1856. The act granting these lands required that the railroad should be built in ten years or the land should revert to the General Government. The ten years expired in 1866. The Land Deparment construed that granting act to mean just what it said on the face of it; that if the road was not built in ten years the land should revert to the General Government. Thereupon after 1866 the Department restored the lands to market. They were open for canal selections, and these lands

were selected. They were open to cash entries, and sales were made for cash. They were open to homestead and pre-emption, and such locations were made. That state of things existed until 1874. From 1866 to December, 1874, when the Schulenberg *vs.* Harriman decision was made, the lands were open to sale to anybody who would pay for them, open to homestead entry, open to selections of the character made by the canal company; and it was only after that Schulenberg decision that the lands were withdrawn from the market. These selections were made within that time.

My idea is that upon the passage of this bill, when the Government asserts a right of forfeiture which has existed since 1866, and the Government comes into possession of these lands again by virtue of that forfeiture, Senators should keep in mind that these canal selections were certified by the Governor of the State of Michigan for the benefit of the canal. Now the fact is that the legal title under the Schulenberg decision to these lands is in the State of Michigan, and the General Government can not convey title.

The same holds good in regard to the cash entries you have heard so much about for the last week or ten days. The Government undertook to sell lands between 1866 and 1874 which its officers supposed they had a right to sell, because the road was not built within ten years. They sold those lands; they selected the 15,000 acres for the canal company. The Supreme Court in the Schulenberg decision of 1874 decided that the Government was not in possession of a legal title to those lands, but the title was in the State of Michigan. I am no lawyer, neither am I a "horny-handed son of toil," as my colleague is.

Mr. PALMER. I think I have the floor.

Several SENATORS (to Mr. PALMER). Do not interrupt him now.

Mr. STOCKBRIDGE. I think the honest and honorable thing, and the thing which the Senate should do, is, if they pass this bill, thereby reinvesting the Government with the title to these lands, to make good what they attempted to do in years past. I think that view of the case should commend itself to every honest and honorable man. I did not mean to say anything about this matter, and I will not say more now. I was going to take up another branch of the subject, but I will not do it.

Mr. PALMER. Mr. President, my colleague has not

met the point wherein he and I differed, and that was in regard to the capacity of the canal for floating the largest vessels on the Lakes. We might as well close——

Mr. STOCKBRIDGE. They were obliged by their contract to give 13 feet of water. They gave more.

Mr. PALMER. Will the Secretary please read what I send to the desk?

The CHIEF CLERK. "House of Representatives, Report No. 684, Forty-eighth Congress, first session."

Mr. PALMER. It is the report of Mr. Henley, from the Committee on Public Lands of the House of Representatives, in the Forty-eighth Congress.

Mr. TELLER. I think that report has been read here about half a dozen times.

Mr. PALMER. There have been statements in regard to the completion of the canal made which that contradicts. I do not myself like to contradict unless I have the authority for doing it.

Mr. TELLER. If there is any defect or any vice in this title it does not grow out of the fact that the canal was not completed. That is a new defect.

Mr. PALMER. Will the Senator permit me?

Mr. TELLER. Let me finish. I want to make my statement so that everybody can understand what I mean.

If there is a defect in this title it is because at the time, as the Senator from Michigan [Mr. STOCKBRIDGE], who has just taken his seat, said, the title was in the State of Michigan and not in the General Government when the certification was made. Now, whether the canal was completed or not, is not a question for us. That has passed beyond the domain of discussion. We said that the governor of Michigan should determine that question. He having determined it, if he made a mistake, everybody understands in law that that is conclusive upon us.

There is no evidence that he made any mistake. There never has been any respectable claim, I think, that he made any mistake. The whole defect, I repeat again, on which these people have been kept from receiving benefit from the land was because there was a misunderstanding in the Department at the time that the certification was made of the rights of the General Government with reference to lands included in that grant, of which there had been no re-entry by the Government, and up to the day of the Schulenberg *vs.*

Harriman decision every act of the Government was in consonance with the act spoken of here.

The Government treated the land as its land and not as the land of the grantee mentioned in the act, whether it was the State or whether it was the company; and I say now whether or not the canal was built is not a question for discussion. The question simply is, whether the Government will now make good the title that it has given to these people or attempted to give them more than fifteen years ago, because the decision in the Harriman case was made in 1874 and the certification was before that. In 1872 I am told the certification was; I do not remember. That is all there is of it; and if we do not make the title good by an act, there is no other way they can get it. The executive department can not give it to them; it must be by legislative action.

As the Senator from Massachusetts has said, if anybody can show any reason why they should not have it, it must be because they did not complete the canal, and because Mr. Bagley and they were guilty of fraud. That would vitiate it, and that alone, and nobody in Michigan or anywhere else has ever suggested that Governor Bagley did not certify to that which in his judgment was right.

If he made a mistake, I can say for the legal profession that it is beyond controversy to-day, that when a matter of that kind is left to a tribunal and it has decided it without the right of appeal expressly being claimed or reserved, that decision is final and can not be inquired into by any power, much less can it be inquired into by the United States in a case of this kind.

Mr. PALMER rose.

Mr. HOAR. Will the Senator before he proceeds allow me to modify my amendment? I wish to add a few words. I desire, with the leave of the Senator——

Mr. PALMER. If it does not involve any further remarks.

Mr. HOAR. No, sir. Where I say "under State selections" I wish to narrow it strictly "under State selections confirmed by the Secretary of the Interior."

The PRESIDENT *pro tempore*. The modification of the amendment to the amendment will be stated.

Mr. GEORGE. Does that limit the amendment?

Mr. HOAR. It limits it only to the State selections which the Secretary of the Interior approved.

The PRESIDENT *pro tempore*. The amendment will be read.

The CHIEF CLERK. In line 7, after the word "laws," it is proposed to strike out the word "and," and to insert "or under State selections confirmed by the Secretary of the Interior."

Mr. PALMER. This is the most intangible, impalpable, illusory, misleading, nebulous fight that I ever was in. [Laughter.] Part of the time it is the equities, part of the time it is the equivalent, part of the time it is the law, but all the time on general principles "We want the land." [Laughter.] All I have to say is that from the very inception of the removal of the register at Marquette this thing has been open to very grave suspicion, and I contend that it can be shown very evidently, and so that it cannot be controverted, that there was collusion at Marquette, and it is a well-known rule of law, I believe—so I have heard it stated in this Chamber—that no man or no corporation can take advantage of its own fraud. Now I would like to have the Secretary read that report.

The PRESIDENT *pro tempore*. The report will be read.

Several SENATORS. What is it?

Mr. PALMER. It is the report I have indicated.

The SECRETARY. "House Report No. 684, Forty-eighth Congress, first session."

Mr. DOLPH. Is that subject to objection?

Mr. PALMER. No, sir; it is part of my remarks.

The PRESIDENT *pro tempore*. The Chair thinks it is not subject to objection. The Senator from Oregon can object to its being read by the Secretary, but the Senator from Michigan can read it himself.

Mr. DOLPH. I do object, because it has been read over and over again.

Mr. PALMER. Nothing will give me greater pleasure than to read it myself.

The PRESIDENT *pro tempore*. It is not customary to object to the reading of papers by the Secretary.

Mr. DOLPH. I withdraw the objection at the suggestion of some Senators.

Mr. PALMER—

It will be observed—

The report goes on to say—

that under the two granting acts——

Mr. CALL. I ask the Senator to give way for an adjournment.

Mr. PALMER. Presently—

these lands were required to be selected in the tiers of sections nearest the canal, of unappropriated land, not mineral, not covered by pre-emption or homestead claims; and 200,000 acres (those included in the grant of 1865), beyond all controversy, were limited to lands subject to private entry. The selections were in fact made contrary to almost every one of these provisions of law. They were not in the tiers nearest the canal; they were made without reference to subsisting pre-emption or homestead claims; they were made of lands not subject to private entry, and over 15,000 acres were upon lands within this railroad grant and withdrawn for its benefit.——

It is well known that this canal company knew that they were entering these lands in contravention of the law. They had able lawyers backing them up all the time who were interested in the company.——

It will also be observed that the company was required by the granting act to construct a breakwater, harbor, and ship-canal at least 13 feet in depth, and that by section 5 of the act of 1865, if the work was not "completed" within two years (afterwards extended to December 1, 1873), the lands thereby granted should "revert to the United States."

It is satisfactorily shown to your committee that no sufficient harbor or breakwater has ever been constructed, and that all that has ever been done by the company or its successors to earn this grant was to build a canal about 2 miles in length, connecting Portage Lake with Lake Superior, and at one end thereof build two piers some 600 feet in length, extending into the lake. Even this work was not reported as having been done until June 25, 1875, over eighteen months after the right of forfeiture had accrued under the extending acts. (Governor's certificate, appendix to Canal History, pages 73, 74.)

It still further appears, from the official records of the office of the Chief of Engineers, in the War Department, that the said canal had not up to 1879 been completed in the manner required by the act, particularly as to the depth of water required, actual soundings in that year by the Government engineers showing an average of much less than 13 feet. Your committee has no information that any work has been done upon the canal since that date.

December 16, 1879, Maj. Henry M. Robert, of the Engineer Corps, United States Army, reported as follows upon this subject:

"I do not think the entrance to the canal can be said to be completed until the piers are extended to a depth of water equal to that which is considered necessary at the harbors constructed directly by the United States. If this were done a great deal of the difficulty experienced in entering the canal would disappear. It is not to be expected that a vessel can be easily steered in rough water when its keel almost touches the bottom. This lack of depth of water at the head of the canal is, in my judgment, the greatest difficulty at this point, and the remedy is for the canal company to complete the work, to aid which the United States donated 400,000 acres of land."

From all the foregoing your committee find that these selections were mainly, if not wholly, made contrary to the provisions of law; that the company, during the period allowed before forfeiture, had not performed the work required; that it has never constructed any sufficient harbor or breakwater; that the canal itself, as finally finished, was not "completed," and never has been completed as prescribed by the granting act; and that the company has no equities entitling it to favorable consideration. Your committee are accordingly of opinion that no act confirming these selections should be passed.

Now, Mr. President, I move that the Senate adjourn.

Before adjournment it was ordered, by unanimous consent, that consideration of the bill be resumed at the conclusion of the morning business on the following day.

MAY 9TH, 1888. The Senate resumed consideration of the bill (Cong. Record, May 10th, 1888, pp. 4081—4084).

Mr. CALL. Mr. President, the amendment proposed is that the sales of lands with the allowance and approval of the officers of the United States, or the selection by any State approved by the Commissioner of the General Land Office and the Secretary of the Interior shall be confirmed where they are along the line of any grant for any public work. That is what we are affirming. If it is meant to say that these acts are in pursuance of the authority of Congress, of the law, then we must disprove the allegations which have been made; we must show that these selections were made in pursuance of the terms of the act. We must show that there has been a completion of this canal, not a certificate of its completion, which might under some circumstances be very serious reason for accrediting of that fact by the grantee and his assigns and might create an equity; but it is not conclusive on the Congress of the United States when there has been an unlawful selection by an executive officer, or by a State officer, and an unlawful approval by an executive officer of the United States. The fact of the certificate by the governor has no legal or logical significance for this purpose in such a case.

We are dealing here with the power of appropriating this land to the purposes described in that act or forfeiting it. You are inquiring as to a compliance with the requirements of the act. You are not asking whether some person has honestly invested his money upon a certificate given by an officer designated in that act, because the allegation here has been that this was a fraud; that the receiver who was appointed himself perpetrated this fraud; that it was a conspiracy to assert facts which did not exist, where no completion has ever been made, and no compliance with the act of Congress.

If these facts can be brought here in a proper form to prove a compliance with the donating act and to show clearly that this money was honestly invested (and I do not say it was not; I am only speaking of the case here presented), then I would vote to confirm the title of that purchaser or investor, be the consequences what they might to the people who may have located upon

that land or who it is desirable should have the right now to locate there. If the good faith of the Government and sound policy of recognizing honest, equitable rights requires it, I should be disposed to follow out that idea.

But we are without the means to decide upon these facts, and therefore I have suggested, and for myself I should prefer that these grants were excepted out of this forfeiture bill, with a requirement that the Secretary of the Interior should investigate, take evidence in proper form, let the parties appear before some United States officer and let that testimony be reported to Congress that Congress may decide and not the Secretary of the Interior as to the rights in good faith and equity of these parties. I think a member of Congress, whether in the Senate or in the other House, ought to assert the jurisdiction of the legislative department. We seem to abdicate our own functions. We vest a discretion in Department officers to do what Congress should do. The power of Congress, and its rightful assertion of jurisdiction, is beginning to be a little felt and a little recognized throughout the country, especially in regard to this matter of the public lands.

Mr. President, I presented the other day a question similar to this. I presented an amendment for the protection of innocent purchasers and actual settlers under color of title where there was no question of the completion of a railroad and compliance with the terms of the grant within the period of time designated in the act; where there was no question of the recognition by the State who was the grantee of the rights of these people, and this was the extent to which the amendment went in that direction, and it was rejected, laid on the table without consideration; but I find here a case where the title is impeached, where two committees of the Senate and of the House have reported against it, where a charge is made of fraudulent practices in the officers of the Government and in the courts and in the parties claiming these lands, by committees of two Houses of Congress, and affirmed as being probably true by a Senator in this body, and this amendment confirming this title thus attacked and thus assailed will be adopted by this body.

An amendment protecting poor people who are innocent purchasers, and nobody alleges the contrary, who have been in possession for years under a grant

which is not impeached and under color of title is rejected without consideration. Well, there is a difference. The one is composed of poor people who have no means of asserting their rights. They are not a great and wealthy body as the Senator from Michigan states the claimants to be who are to be benefited by this amendment, but they are poor and humble people. The difference between the cases: The only difference is that in their case there is no impeachment whatever, there is no charge of fraud, there is no question of compliance with the terms of the granting act literally, and within the period of time required by the act. But these people are to be set aside, left unprotected, while in this case the confirmation is insisted upon.

Mr. President, for these reasons I object to this amendment. While I am willing to vote for an amendment excepting the Portage Lake Canal Company from the operation of this act, and also the Ontonagon and Brulé River Railroad Company, and requiring the present status of the lands to remain unchanged until a full investigation and report of the facts can be made to Congress, and an intelligent and deliberate consideration had by this body—when that shall be done I shall vote to confirm every title in every individual who is not a party to nor charged with knowledge of a conspiracy to perpetrate a fraud upon the Government, every innocent purchaser whom the evidence shall show has invested his money without reasonable notice of the fraud that is charged to have been committed and without notice of the circumstances attending this case.

That is the full extent to which we ought to go. There can be no further step taken properly in a case of this kind until all the facts are presented to us, and presented to us in a form in which they cannot be asserted, on the one side and denied on the other.

The PRESIDING OFFICER (Mr. BERRY in the chair). The question is on the amendment of the Senator from Massachusetts [Mr. HOAR] to the amendment made as in Committee of the Whole.

Mr. GEORGE. Mr. President, I have no feeling in this matter except to do exactly what is right. I desire to call the attention of the Senator from Massachusetts [Mr. HOAR] to what I am about to say.

Under the explanation made by the Senator from Massachusetts yesterday and the failure of the Senator from Michigan [Mr. PALMER] to controvert or dispute in any way the explanation made by the Senator from

Massachusetts, I am inclined to believe it my duty to vote for a confirmation of the land grant to the canal company, but with this reservation (and that is the point to which I desire to call the attention of the Senator from Massachusetts) that in doing that I think it is my duty to preserve the rights of pre-emption claimants and homestead claimants. If I am satisfied that those rights are sufficiently protected, then I shall vote for the amendment offered by the Senator from Massachusetts. Unless I am so satisfied, I shall not be able to vote for it.

I therefore wish to call the attention of the Senator from Massachusetts to the point whether the language of the amendment is sufficient to protect the rights of pre-emptors and homesteaders on the land which his amendment proposes to confirm to the canal company.

Mr. HOAR. The language on that particular point was drawn by the Senator from Wisconsin.

Mr. SPOONER. No; the amendment was drawn by the Senator from Michigan [Mr. PALMER]. It was offered by him, and I accepted it.

Mr. HOAR. The language is this:

Nothing herein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted under color of the laws of the United States.

I suppose that covers and protects that class of rights which the Senator from Mississippi refers to, and that the foregoing confirmation does not operate as against them. That is the way I understand it.

Mr. GEORGE. The trouble I have about it is that the confirmation to the canal company is neither a sale nor an entry, but it is a grant, and I fear that under the language used the claims of the homesteaders and pre-emption men will not be sustained.

I suggest, if the Senator from Massachusetts is in accord with me in the purpose to save the rights of the homesteaders and pre-emption claimants, that we add at the end of the clause which we are now considering, the proposition of the Senator from Michigan which has been adopted, the words:

And all such pre-emption and homestead claims are hereby confirmed.

With that addition I should be willing to support the amendment of the Senator from Massachusetts.

Mr. SPOONER. It seems to me that the point made by the Senator from Mississippi is perhaps well taken. In other words, I think while the proviso as to the confirmations which would be brought about by my amendment, if adopted, is not so drawn as to embrace the case of bona fide homesteaders and settlers as against the State selections, I suggest to the Senator that if he would add the words "or State selections" after the words "entries of lands" he would cover the ground.

Mr. GEORGE. It would then read:

Nothing herein contained shall be construed to confirm any sales or entries of lands or State selections.

Mr. HOAR. I have no objection to that.

Mr. SPOONER. I think the point made by the Senator from Mississippi is well taken.

Mr. HOAR. I will so modify my amendment, with the leave of the Senator from Mississippi.

Mr. GEORGE. Then what is the objection to adding the words I have suggested, to remove all doubt, that all such bona fide pre-emptions mentioned before, and homestead claims, are hereby confirmed? What is the objection to that? That removes all doubt.

Mr. TELLER. I should like to suggest to the Senator from Mississippi that we do not confirm any of those titles. All we want to do is to leave the parties with the rights they now have and let the Department deal with them. There will be a contest between different entrymen, and if we should confirm one we might cut another one out. If we simply leave it so that the bill will have no effect whatever upon their claims, and they are bona fide settlers, then the Department will act.

Mr. GEORGE. I do not think that is sufficient.

Mr. HOAR. Suppose there were three or four bona fide claimants to the same tract of land. Of course, their titles require confirmation to be effective, but they are bona fide claimants.

Mr. GEORGE. They cannot all be bona fide.

Mr. HOAR. Certainly; there can be half a dozen bona fide claimants to the same tract.

Mr. TELLER. Three or four settlers might be on the same quarter-section, having in good faith attempted to make an entry.

Mr. GEORGE. I will fix it now.

Mr. DOLPH. The first portion of the amendment of the Senator from Wisconsin confirms all the entries in general terms.

Mr. GEORGE. I suggest to add to line 5 of the amendment which was proposed by the Senator from Michigan [Mr. PALMER] the words:

And all such pre-emption and homestead claims are hereby exempted from the operations of this act.

What I want to do is to make it certain that the bona fide pre-emptors and settlers on this land shall not be deprived of their rights as they exist now.

Mr. DOLPH. If the Senator from Mississippi will allow me to make a suggestion to him, he will see that his amendment is in direct conflict with the other portion of the amendment of the Senator from Wisconsin. The amendment of the Senator from Wisconsin reads:

That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States, under color of the public-land laws, and where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed.

Everybody, pre-emption claimants, homestead entrymen, cash sales, all disposals are hereby confirmed. Then, in order that these confirmations of cash entries and of selections shall not cut out conflicting homestead and pre-emption entries, the last clause of the amendment comes in:

That nothing herein contained shall be construed to confirm any sales or entries of land upon which there were bona fide pre-emption or homestead claims on the

1st day of May, 1888, arising or asserted under color of the laws of the United States.

The amendment, as it stands now, without the amendment proposed by the Senator from Mississippi, would leave the claims of these pre-emption and homestead entrymen to be confirmed; but now comes in the Senator with an amendment which says that this proposed act shall not cover them; that whenever any of these lands are settled upon by homestead and pre-emption claims the act shall not cover them, and the claims of cash entrymen and others shall not be confirmed where there is no conflict. I think that is in contradiction with the first part of the amendment.

Mr. GEORGE. Why not let it stand, then, as I originally drew it? I first proposed to add:

And all such pre-emption and homestead claims are hereby confirmed.

Mr. DOLPH. Because they are confirmed, if the Senator will turn back to line 10 of the printed amendment.

Mr. GEORGE. Then it is only an objection to the style. Certainly the idea is, and I understand that to be the sense of the Senate, that we ought to provide in this bill that the claims of bona fide homesteaders and pre-emptors shall be confirmed. That is all I want to have done.

Mr. DOLPH. The claim of a pre-emption claimant cannot be confirmed until he has paid the money and it has been received by the Government.

Mr. GEORGE. A claim can be confirmed.

Mr. DOLPH. A homesteader must live five years on his land and conform to the requirement of the statute, and then he gets his title.

Mr. GEORGE. That is correct. The claim is only confirmed; the claim is made good; that is all. The court will consider that; but I wish simply to provide that nothing herein shall prevent the claimant from going on regularly under the laws of the United States and perfecting his pre-emption or homestead claim.

Mr. DOLPH. By the first portion of the amendment it is proposed to confirm all dispositions of the land forfeited by this act, but for fear that the confirmation of cash entries and State selections will cut out certain homestead and pre-emption claimants, it is provided that—

Nothing herein contained shall be construed to confirm any sales or entries of lands.

That means cash entries; and now it has been amended so as to read:

Or State selections.

Mr. SPOONER. It has not been so amended yet.

Mr. DOLPH. I thought that was accepted by the Senator. It has not been amended, but is a part of the pending amendment.

The PRESIDING OFFICER. That amendment is pending.

Mr. DOLPH. It is a part of the pending amendment of the Senator from Massachusetts. It will be the amendment, if that is adopted:

Upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888.

But any bona fide pre-emption or homestead claims are covered by the first portion of the amendment. You may insert the word "cash" before "entries."

Mr. GEORGE. I am afraid that will not answer, and therefore I shall insist, in order to remove all doubt on the subject, and it can do no harm, that the words be added:

And all such pre-emption and homestead claims are hereby confirmed.

Mr. SPOONER. What would the Senator do in cases where there are contests between pre-emptors?

Mr. GEORGE. They must be decided according to the one who has the right to the land.

Mr. SPOONER. I would say to the Senator——

Mr. GEORGE. The answer to that is this: it is not the wrong claim that is confirmed. The one who has a superior claim will have his claim confirmed, and the one who has an inferior claim or a bad claim will not have it confirmed.

Mr. SPOONER. Does not the Senator think that the laws of the United States, as they now exist, are ample to protect bona fide homestead and pre-emption claimants, if it is clearly and expressly

declared that nothing in the act shall operate to their prejudice?

Mr. GEORGE. It is not so declared.

Mr. SPOONER. It is so declared, I think; it was intended to be so declared. The main proposition was to confirm certain cash entries.

Mr. GEORGE. Point out in the bill where their claims are confirmed.

Mr. SPOONER. I will undertake to do it.

Mr. GEORGE. That is all I want to have done.

Mr. HOAR. While the Senator is looking for that, I should like to make a modification of my amendment by putting in, after the words "State selections," the words "in Michigan." I understand that to be the meaning of the amendment as it now stands; that it refers to grants heretofore made to the State of Michigan; but some question has been raised whether it would not extend to other States which have not been discussed. I therefore modify my amendment.

The PRESIDING OFFICER. The Secretary will state the proposed modification.

The CHIEF CLERK. In line 7 strike out the word "and" and insert the words "or under State selections in Michigan confirmed by the Secretary of the Interior."

The PRESIDING OFFICER. If there be no objection the amendment will be so modified.

Mr. CALL. Mr. President, I should like to ask the Senator from Mississippi if the selection of these lands was made and approved to the canal company, how is it that a homestead settler or anybody else, not holding under that company, can rightfully have a title or an interest in the land confirmed to him; and upon what theory the amendment can be sustained, except that there is no title now existing in the canal company or persons holding under them, and that a title is now at this time created by Congress either under the homestead or pre-emption law?

Mr. GEORGE. The answer to that is a very plain one, Mr. President. The explanation made by the Senator from Massachusetts [Mr. HOAR] yesterday showed this state of facts, that owing only to the circumstance that there had been an old grant which had never been complied with of these lands to a railroad company, the location of these lands by the canal company was not valid. I have made up my mind that in the interest of justice and fairness the old claim of the

railroad company which is forfeited by this bill, which has nothing but an ideal and nebulous existence, should not stand in the way of the grant to the canal company upon conditions which I understand have been fully complied with.

I am willing to make that confirmation in general terms, but as we must have a confirming act, in the interest of the homesteaders and pre-emptors, I propose to withhold from the confirming act these claims, so that nothing will be done here which will prejudice in any way whatever the interest of that very meritorious class of our citizens.

I hope that is an answer to the Senator from Florida.

Mr. SPOONER. I have from the outset stated that I had no desire whatever nor even a willingness to participate in the passage or favor the passage of any proposition which would confirm the title of any one to the detriment of a bona fide homestead or pre-emption claimant. If the language proposed by the Senator from Mississippi strengthens the protection, and I am inclined to think it does, which the original amendment offered by the Senator from Michigan throws around the homestead and pre-emption claimants, I am entirely willing, so far as I am concerned, to support it, and I shall vote for it.

The PRESIDING OFFICER. The amendment of the Senator from Mississippi is not now in order.

Mr. GEORGE. Are any of these lands in the State of Wisconsin?

Mr. SPOONER. Not one acre.

Mr. GEORGE. They are wholly in the State of Michigan?

Mr. PALMER. Yes, sir.

Mr. GEORGE. I will be satisfied that any language shall be used to preserve the rights of these homesteaders which the Senator from Michigan [Mr. PALMER], the State in which these claims exist, will declare is satisfactory to him.

Mr. SPOONER. I said what I did because it was an amendment to my amendment.

Mr. PALMER. I thought it was an amendment to my amendment.

Mr. SPOONER. I had accepted the amendment of the Senator from Michigan, and it then became a part of my amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from

Massachusetts [Mr. HOAR] to the amendment of the Senator from Wisconsin [Mr. SPOONER], which was adopted as in Committee of the Whole.

Mr. PALMER. I ask that it be read.

Mr. HOAR. I will accept the amendment of the Senator from Mississippi [Mr. GEORGE] if I am at liberty to do so.

The PRESIDING OFFICER. The Secretary informs the Chair that that amendment comes in at a different point, and that it can not be accepted in that way.

Mr. HOAR. Very well. I do not understand that there is any objection to the amendment of the Senator from Mississippi.

Mr. PALMER. I wish to hear it read first.

Mr. HOAR. I ask leave, then, if there be no objection, that the vote be first taken on the amendment of the Senator from Mississippi.

Mr. PALMER. Let it be read.

Mr. GEORGE. I understood the Senator from Massachusetts to accept my amendment.

The PRESIDING OFFICER. The amendment of the Senator from Mississippi is not now in order under the rules, because it is an amendment to another part of the amendment made as in Committee of the Whole.

Mr. HOAR. It is in order by unanimous consent, and I ask unanimous consent that the question be put upon that amendment first. It is not an amendment in the third degree; it is only an amendment in another place in the matter to be amended, so that it is just as much in order as my amendment is in order, except that ordinarily the question would be put on mine first. As I happen to offer it first, I merely ask unanimous consent that the question may be taken on the amendment of the Senator from Mississippi before it is taken on mine.

The PRESIDING OFFICER. The Senator from Michigan [Mr. PALMER] has asked to have the amendment read. It will be read.

The CHIEF CLERK. At the end of line 5 of the "amendment intended to be proposed by Mr. PALMER," after the word "States," add the words:

And all such pre-emption and homestead claims are hereby confirmed.

The PRESIDING OFFICER. The Senator from Massa-

chusetts [Mr. HOAR] asks unanimous consent that the vote be taken on the amendment proposed by the Senator from Mississippi before the vote is taken on the amendment offered by him. Is there objection? The Chair hears none; and the vote will be so taken.

Mr. PALMER. I should like to have the amendment read so as to show how the clause will appear consecutively.

The PRESIDING OFFICER. The Secretary will read the amendment as requested.

The CHIEF CLERK. At the end of line 5, after the word "States," add the words:

And all such pre-emption and homestead claims are hereby confirmed.

So as to read:

Nothing herein contained shall be construed to confirm any sales or entries of lands upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted under color of the laws of the United States; and all such pre-emption and homestead claims are hereby confirmed.

Mr. CALL. Mr. President, the Senator from Mississippi says that he is in favor of protecting and confirming the rights of persons who have gone upon this land and made application for homestead or pre-emption settlement, because it was within the limits of a railroad grant which, under the decision of the Supreme Court in Schulenberg *vs.* Harriman, was supposed to be alive at the time the selection was made; and that the granting act to the canal company having been complied with in all respects, this was a mere technical error. I do not think that fact would invalidate the title, for I have myself no doubt that a grant which Congress demands is to terminate by force of law at a particular time, if it be a law, must execute itself.

I have no doubt that if the Ontonagon and Brulé Railroad was not completed according to the requirements of the act of Congress, and the grant was made dependent by the law upon that completion, the selection was a good one. The proposition of the Senator from Mississippi is entirely correct that a valid grant

complied with in its terms would give an equitable right to the thing granted, although there was some mere technical error, and that this amendment gives it validity as a matter of law; but that reason is just as good for the whole as for any part of the grant. It is just as obligatory upon the conscience of the Senator from Mississippi to vote the land occupied by the homesteader or any other intruder upon a valid grant as it is upon that unoccupied, and the right of the man who wishes to homestead, who now desires to go upon the land, is just as great, so far as the right is concerned, as the man who is upon it, except that in the latter case he has expended time and effort in his improvement.

But as I understand the case here, there is on one side a certificate of the governor showing compliance with the terms, and on the other there is a declaration of the receiver of the court that there had been no compliance. There is an acquisition of the property by a fraudulent declaration that this grant had not been complied with, and that these lands were not the property of the company. I understand the allegation to be that the present claim of right or title rests upon that fact, and that the same parties are now the owners who were the owners then.

I do not undertake to say that this is true. I say that is the allegation here, and it is made by two committees of Congress, and against it only is the single fact of a certificate by a governor of a compliance with the terms. That I understand to be the case here, so that it can not be put upon the ground that there has been proved here a compliance with the terms of the grant. The Senator from Michigan has had read this morning document after document, the statements of witness after witness, and the reports of two committees of Congress, in express denial of that allegation.

I say that notwithstanding that statement, if it be evidenced here that there has been an honest investment in good faith by an innocent purchaser of his money without reasonable notice, and the facts should be proved, I should vote for it; but that fact is not proved. It is not made clear. It may be true. I do not undertake to say that it is not true, but the evidence is to the contrary; but I say that there is no proof at this time as against the evidence of noncompliance to establish the fact of compliance with this grant.

Therefore the proper course for us to pursue would

be to instruct the Secretary of the Interior, after excepting this grant from the operation of this act, to take testimony upon that subject, and when it shall come here to protect by positive legislation every man who is an investor, without notice making his investment by either the permissive neglect of the Government in asserting its right or otherwise; and that we should protect him in his rights. Then, if there is a remainder not covered by such cases, let us open the land to settlement by the people of the country.

Mr. BLAIR. I hope we may now have a vote.

Mr. SPOONER. I wish to make a suggestion to the Senator from Massachusetts. His amendment is to confirm, I understand, if adopted, all State selections approved by the Secretary of the Interior.

Mr. HOAR. In Michigan.

Mr. SPOONER. Has it been so amended?

Mr. BLAIR. It has been so amended, and besides it is not the question before the Senate. I ask for a vote on the question before the Senate.

The PRESIDENT *pro tempore*. The pending amendment will be stated.

The CHIEF CLERK. In line 5, after the word "States," it is proposed to add the words:

And all such pre-emption and homestead claims are hereby confirmed.

The PRESIDENT *pro tempore*. By unanimous consent the question on the amendment of the Senator from Massachusetts is laid aside for the consideration of the amendment just reported, proposed by the Senator from Mississippi. Is the Senate ready for the question?

The amendment to the amendment was agreed to.

The PRESIDENT *pro tempore*. The question now recurs on the amendment proposed by the Senator from Massachusetts to the amendment made as in Committee of the Whole. It will be again read if desired.

Mr. PALMER. Let it be read.

The CHIEF CLERK. In line 6 of the proposed amendment, after the word "States," strike out the words "by sales or entries, by cash warrants or scrip;" and in line 7, after the word "laws," strike out the word "and" and insert "or under State selections in Michigan con-

firmed by the Secretary of the Interior;" so as to read:

That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States, under color of the public-land laws or under State selections in Michigan confirmed by the Secretary of the Interior, where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed.

Mr. PALMER. I hope that amendment will not prevail. As is very evident from what I said this morning it proposes to confirm a grant that is invalid and which the equities of the case, in my opinion, demand should not be confirmed. I shall not weary the Senate any further with any remarks, but it confirms the canal grant, which is the thing about which we have had the contest.

Mr. HOAR. It will be observed that the amendment proposed by the Senator from Wisconsin does not confirm the grant unless the Secretary of the Interior finds that the title was acquired in good faith for a valuable consideration, which consideration has been received and retained by the Government. All the matters which the Senator has debated have to be passed on by the officers of the Government.

Mr. PALMER. I will say that I should hate to delegate that power to any Secretary of the Interior. I prefer to have it decided here, and I know, if the Senate understood the amendment thoroughly, it would not get ten votes in the Senate.

The PRESIDENT *pro tempore*. Is the Senate ready for the question on agreeing to the amendment of the Senator from Massachusetts [Mr. HOAR] to the amendment made as in Committee of the Whole?

Mr. BERRY. I ask for the yeas and nays.

Mr. PALMER. Yes, let us have the yeas and nays.

The yeas and nays were ordered, and the Secretary proceeded to call the roll.

The amendment of Senator SPOONER was agreed to—27 yeas to 14 nays. The amendment as so agreed to in Committee of the Whole was concurred in by the Senate, and the bill as so amended was passed (p. 4085).

Later, on the same day, Senator CALL moved a reconsideration of the vote by which the bill was passed, for the purpose of moving an amendment relative to lands in Florida, and by unanimous consent it was ordered that the matter be taken up on the following day, immediately on the termination of the morning business.

MAY 10TH, 1888. Pending the motion to reconsider, the following discussion took place (Cong. Record, May 11th, 1888, pp. 4123, 4124) :

Mr. PALMER. I hope that the vote may be reconsidered. There was a very grave error committed yesterday in adopting the amendment of the Senator from Mississippi [Mr. GEORGE]. The phraseology in my amendment to the amendment of the Senator from Wisconsin [Mr. SPOONER] is different from the phraseology in the amendment itself of the Senator from Wisconsin, and it does not accomplish the object that the Senator from Mississippi intended to accomplish by his amendment.

Mr. HOAR. The Senator from Mississippi offered a certain amendment to my amendment, which I accepted. I stated that I did not design to prevent the accomplishment of the object which the Senator from Mississippi had in view. I understand that in the haste of drawing that amendment the Senator from Mississippi did not quite accomplish what he intended. Certainly I have no desire to take any snap judgment or to get any advantage by a misunderstanding of the Senator who drew the amendment which I accepted, and therefore I shall feel bound in honor to agree to the reconsideration; but I suppose, of course, the Senators on the other side would feel equally bound, if a reconsideration was made, not to reopen

the whole controversy, but simply to have the modification made in accordance with the desire of the Senator from Mississippi.

Mr. SPOONER. I am as reluctant as any Senator on this floor to open again the discussion of any of these amendments, or of any proposition connected with the bill. I understand from the Senator from Michigan that if the bill is corrected in this one single respect he has no desire to offer further amendments under the circumstances.

I desire to explain to the Senate in a word why I think the vote should be reconsidered and the change made in the bill. Yesterday afternoon, the Senator from Mississippi [Mr. GEORGE] seemed to be under the impression that the rights of homestead and pre-emption claimants were not adequately protected by the bill, and he offered an amendment which was intended to protect them, but which I think for want of a further amendment fails of accomplishing his purpose. The amendment which I offered simply provided for the confirmation of cash entries, and the proviso protecting the rights of homestead claimants was limited to cash entries. Afterwards upon the motion of the Senator from Massachusetts [Mr. HOAR] the Senate embodied in the amendment certain "State selections," so that the amendment should be operative to confirm cash entries and State selections, but the Senator from Mississippi omitted to do what I understood he had done, to insert in the proviso, saving the rights of homesteaders, the words "State selections;" so that as it stands now, as I read it, it protects only the rights of bona fide homesteaders and pre-emption claimants against the cash entrymen, but does not protect such right as against these "State selections" of the canal company. I think, in order to carry out the manifest purpose of the Senator——

Mr. GEORGE. Allow me to say that my only object was to protect the homesteaders and pre-emptors, and if the amendment I offered fails to effect that object I shall be very glad to have the Senator perfect it.

Mr. SPOONER. I suggested to the Senator at the time that he add to the proviso the words "State selections," and he wrote it down in his copy of the amendment, and I supposed he had offered it; but I find it is not in the bill, so that the amendment which I shall offer, if the vote is reconsidered, will be simply to insert in the proviso the words "or any tract in any

such State selection," and the proviso would then read:

Provided, That nothing herein contained shall be construed to confirm any sales or entries of land on any tract in any such State selection upon which there were bona fide pre-emption or homestead claims, etc.

Mr. SPOONER. I move the amendment which I send to the desk.

The PRESIDENT *pro tempore*. The amendment will be read.

The motion to reconsider was agreed to, and the following proceedings were had:

The CHIEF CLERK. In line 2 of the proviso to the section inserted as section 9, after the word "lands," it is moved to insert "or any tract in any such State selection;" so as to read:

That nothing herein contained shall be construed to confirm any sales or entries of lands or any tract in any such State selection upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted under color of the laws of the United States; and all such pre-emption and homestead claims are hereby confirmed.

The PRESIDENT *pro tempore*. The question is on agreeing to the amendment proposed by the Senator from Wisconsin [Mr. SPOONER].

The amendment was agreed to.

After further amendment in relation to certain lands in Florida, the bill was passed (p. 4128).

MAY 11TH, 1888. The bill, as passed by the Senate, was sent to the House, and referred.

JULY 5TH, 1888. The bill was reported to the House, with an amendment in the nature of a substitute.

The bill, as received from the Senate was as follows (Cong. Record, pp. 6439, 6440):

Be it enacted, etc., That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction or benefit of which lands have heretofore been granted; and all such lands are declared to be a part of the public domain: *Provided*, That this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted: *And provided further*, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title: *And provided further*, That nothing herein contained shall be construed to except from forfeiture that portion of the grant made by "An act making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," approved June 3, 1856, or acts amendatory thereof, conferred by the State of Michigan on the Marquette and Ontonagon Railroad Company, lying west of L'Anse, in said State.

SEC. 2. That in all cases where persons are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed in good faith prior to January 1, 1886, they shall be entitled to purchase the same from the United States, in quantities not exceeding 320 acres to any one such person, at the rate of $2.50 per acre, at any time within two years from the passage of this act, and on making requisite proofs and payment to receive patents therefor: *Provided*, That in all

cases where parties, persons, or corporations, with the permission of such State or corporation, or its assignees, are in the possession of, and have made improvements upon any of the lands hereby resumed and restored and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to remove all buildings and other movable improvements from said lands: *And provided further*, That the provisions of this section shall not apply to any lands situate in the State of Iowa, on which any person, in good faith, has made, or asserted the right to make, a preemption or homestead settlement.

SEC. 3. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the "Harrison line," being a line drawn from Wallula, Wash. Ter., easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section 27, in township 7 north, of range 37 east of the Willamette meridian; all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July 1, 1885, or who at said date were in possession of any portion of said lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act, at the rate of $2.50 per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession, or improvement, and payment therefor, without limitation as to quantity: *Provided*, That the rights of way and riparian rights heretofore attempted to be conveyed to the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, by deed of conveyance dated August 8, 1886, and which are described as follows: A strip of land 50 feet in width, being 25 feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter

finally located according to the provisions of an act of the Legislative Assembly of the State of Oregon approved November 25, 1885, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following-described tracts of land: Sections 19 and 31, in township 1 south, of range 6 east; sections 25, 31, 33, and 35, in township 1 south, of range 5 east; sections 3 and 5, in township 2 south, of range 5 east; section 1, in township 2 south, of range 4 east; sections 23, 25, and 35, in township 1 south, of range 4 east of the Willamette meridian, in the State of Oregon, forfeited by this act, are hereby granted and confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore-described strip of land, over and across the above-described sections, for the purpose of constructing, maintaining, and repairing a water-pipe line as aforesaid.

SEC. 4. That nothing in this act shall be construed to waive or release in any way any right of the United States to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant, or as forfeiting any lands that have been heretofore earned by the construction of any portion of a railroad under any act of Congress making a grant of public lands: *Provided*, That this act shall not be constructed to prejudice any right of the Portage Lake Canal Company, or the Ontonagon and Brulé River Railroad Company, or any person claiming under them, to apply hereafter to the courts or to Congress for any legal or equitable relief to which they may be now entitled, nor to prejudice any right of forfeiture or recovery of the United States in respect of any of the lands claimed by said companies, nor to the prejudice of the right of any person claiming adversely to said companies or their assigns, under the laws of the United States.

SEC. 5. That this act shall not take effect except as to lands which were entered under the homestead and pre-emption laws and at private entry while the same were held by the Interior Department to be subject to such entry until January 1, 1889, as to a grant of land to the State of Mississippi for the purpose of aiding in the construction of a railroad from Brandon to the Gulf of Mexico, commonly known as the Gulf and Ship Island Railroad, nor as to a grant of land to the State

of Alabama for the purpose of aiding in the construction of a railroad from the Tennessee River at or near Gunter's Landing to Gadsden, on the Coosa River, and in all cases where any of the lands excepted as aforesaid in this section have been sold by the proper officers of the United States for cash, or with the allowance and approval of such officer have been entered in good faith under the homestead or pre-emption laws, the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed.

SEC. 6. The price of the even sections of the public lands not reserved within the limits of the portions of the several grants hereby forfeited, and within the limits of all grants or portions of grants heretofore forfeited, and of all lands hereby and heretofore forfeited, is hereby fixed at $1.25 per acre.

SEC. 7. That section 5 of an act entitled "An act for a grant of lands to the State of Iowa in alternate sections, to aid in the construction of a railroad in said State," approved May 12, 1864, and section 7 of an act entitled "An act extending the time for the completion of certain land grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March 3, 1865; and also section 5 of an act entitled "An act making an additional grant of lands to the State of Minnesota in alternate sections, to aid in the construction of railroads in said State," approved July 4, 1866, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed; and so much of the provisions of section 4 of an act approved June 2, 1864, and entitled "An act to amend an act entitled 'An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State,' approved May 15, 1856," be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or 6 miles granted limits of the roads mentioned in said act of June 2, 1864, or the act to which the same is amendatory.

SEC. 8. That all actual settlers on any of the public lands in the State of Florida affected by the grants, who made actual settlement on any of said lands, after the time limited in the granting act for the construction of the said road, and before May 1, 1888, shall have the right to perfect their entries respectively under

the homestead or pre-emption laws: *Provided*, That the title to the land described in the act entitled "An act granting lands to the States of Alabama and Florida to aid in the construction of certain lines of railway in said States," approved the 17th of May, 1856, which lies adjacent to the part of the lines of railroad built under and in pursuance of the act of the the State of Florida entitled "An act to encourage a liberal system of internal improvements in the State of Florida," approved January 5, 1855, within the time limited by Congress in the granting act, and which were granted to any of the said companies by the Legislature of the State of Florida in accordance with said act of Congress, and are held by purchase in good faith from said companies, made before the year 1866, are hereby confirmed to such purchasers: *Provided*, That a mortgage or pledge of said lands by any of said companies shall not be considered as a sale for the purpose of this act.

SEC. 9. That in all cases where any of the lands forfeited by the first section of this act, or when any lands relinquished to or for any cause resumed by the United States from grants for railroad purposes heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States, under color of the public-land laws, or under State selections in Michigan confirmed by the Secretary of the Interior, where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: *Provided, however*, That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

The substitute proposed by the committee was read, as follows:

That all lands heretofore granted by Congress to any State or to any corporation to aid in the construction of a railroad or a railroad and telegraph line opposite to and coterminous with the portion of any such railroad not constructed and contemplated within the time specified in the act making the grant for the construction and completion of the whole of such railroad are hereby declared forfeited to the United States, and the United States resumes title thereto, and all such lands so granted lying opposite to and coterminous with the portion of any such railroad not constructed and completed within the time prescribed by the act of Congress making such grant for the construction and completion of the whole railroad as provided for by such act is hereby restored to the public domain and declared to be a portion thereof: *Provided, however*, That the forfeiture hereby declared shall not extend to the right of way of any such railroad through the remainder of the route, including the necessary grounds for depots, switches, side-tracks, machine-shops, and turn-tables, or to lands included in any village, town, or city within the limits of the lands hereby declared forfeited.

SEC. 2. That the forfeiture hereby declared shall not extend to lands adjacent to and coterminous with any portion of any such railroad which is now completed which were sold by the State or corporation to which any such grant was made, or by the corporation controlling or owning such railroad prior to January 1, 1888, to bona fide purchasers for a good and valuable consideration, but the title to such lands are hereby confirmed to such purchasers, their heirs or assigns, upon condition that all persons claiming the benefit of this section shall, within one year from the passage of this act, make and file before the register and receiver of the proper land office, subject to an appeal to the Commissioner of the General Land Office, proof of the good faith, consideration, date, and extent of his or her purchase; and after hearing such proofs and investigating each case the register and receiver shall determine whether any alleged purchase was in fact made in good faith, for a good and valuable consideration, prior to January 1, 1888, and shall note the finding in each

case on the records of the local land office, and shall thereafter certify the same to the Commissioner of the General Land Office: *Provided*, That nothing herein contained shall be construed to confirm any such purchases of land upon which there were prior bona fide pre-emption or homestead claims, valid and subsisting on the 1st day of January, 1888, arising or asserted under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed: *Provided*, That a mortgage or pledge of any of said lands shall not be considered a sale for the purposes of this act.

SEC. 3. That all bona fide settlers upon any of the land forfeited by this act are hereby permitted and authorized to acquire title to not exceeding 160 acres in each case, as a homestead, under and pursuant to the laws relating thereto, and in making final proof of such homestead, the settler shall be allowed for the time he has already resided upon and cultivated the same, and if such settler is not entitled to the benefits of the homestead law he or she shall have the prior right to enter the tract settled on not exceeding 160 acres at $1.25 per acre.

SEC. 4. That no lands declared forfeited to the United States by this act shall inure to the benefit of any State or corporation to which lands may have been granted by Congress; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to waive or release in any way any right of the United States to have other lands granted by them as recited in the first section forfeited for any failure past or future to comply with the conditions of the grant.

SEC. 5. That all lists of lands heretofore certified and all patents issued to any State, or to any corporation, for lands embraced in any grant beyond the portion thereof coterminous with the railroad actually completed within the time prescribed by law for its entire completion are hereby declared inoperative and void except as to bona fide purchasers as provided for by the second section of this act, and excepting land included in any village, town, or city, and the proper proceedings shall be instituted by the Attorney-General to annul the same.

SEC. 6. That all acts in conflict with this act are repealed.

The bill and the substitute were discussed at length, but the discussion has no bearing on the subject of confirmation of cash entries, or State selections, or on the Canal Company lands. The substitute was agreed to, and on the following day (July 6th) it passed the House.

JULY 9TH, 1888. The Senate refused to concur in the amendment, and asked for a committee of conference. (Cong. Record, July 10th, 1888, p. 6545.)

JULY 11TH, 1888. The House insisted on its amendments and agreed to the conference. (Cong. Record, July 12th, 1888, p. 6673.)

AUGUST 27TH, 1888. In the Senate, the Committee on Public Lands reported Senate Bill 858, "To forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon, in said State," (Cong. Record, Aug. 28th, 1888, p. 8767), and SEPTEMBER 19TH, 1888, after some amendments, the bill passed the Senate.

SEPTEMBER 21ST, 1888. The bill was laid before the House and the following proceedings were had (Cong. Record, Sept. 22d, 1888, p. 9728):

Mr. HOLMAN. I did not notice the title of the bill, and I ask that the bill be read, and then that the House will devote a moment to its consideration.

The bill was read, as follows:

Be it enacted, etc., That all lands granted to the State of Michigan for the use and benefit of any railroad company or companies, whatever their corporate name, to aid in building and completing a railroad from Marquette to Ontonagon, in said State, by an

act of Congress approved June 3, 1856, and by any and all acts of Congress amendatory or supplementary thereto that relate to the same subject-matter, which are uncertified lands within the limits of the grant, together with all the lands, certified or uncertified, which lie opposite the uncompleted portion of said road, extending from L'Anse to Ontonagon, are hereby declared, by reason of the breach of the conditions upon which the grant was made, forfeited; and that all of said lands be restored to the public domain and made subject to sale and settlement under existing laws of the United States.

The SPEAKER *pro tempore*. Is there objection to the present consideration of this bill?

Mr. HOLMAN. The bill has not been referred to the Committee on Public Lands; but that committee has had a meeting this morning, and considered the bill. The road mentioned is covered by the general bill which the House passed some months ago, and which is still under consideration in the Senate; but there seems to be propriety in passing this measure at once with an amendment which will be submitted by the gentleman from Illinois (Mr. PAYSON). I therefore submit the following amendments, which have been agreed to by the Committee on Public Lands.

The Clerk read as follows:

In lines 11 and 12, strike out the words "which lie opposite the uncompleted portion of said road;" and in lines 17 and 18, strike out "existing laws of the United States," and insert "homestead law, except section 2301 of the Revised Statutes shall not apply;" and add the following sections:

"SEC. 2. That all settlers upon any lands forfeited by this act are hereby permitted and authorized to acquire title to not exceeding 160 acres in each case as a homestead, under and pursuant to the laws relating thereto; and in making the final proof of such homestead, the settler shall be allowed for the time he has already resided upon and cultivated the same.

"SEC. 3. That no lands declared forfeited to the United States by this act shall inure to the benefit of any corporation to which lands may have been transferred or granted under any act of Congress; nor shall this act be construed to enlarge the area of land covered by any such grant or to waive or release in any way

any right of the United States to have lands granted by them, as recited in the first section, forfeited for any failure, past or present, to comply with the conditions of the grant."

Mr. HOLMAN. Mr. Speaker, I wish to say in behalf of these amendments that they are all in harmony with the provisions of the general bill which passed the House some months ago and is now in the Senate.

The amendments were agreed to.

Mr. HOLMAN. I now yield to the gentleman from Illinois [Mr. PAYSON].

Mr. PAYSON. I offer an amendment which I send to the desk.

The Clerk read the amendment, as follows:

Insert after the word "Ontonagon," in line 10, the words "and also all lands granted to the State of Michigan under the act of Congress approved June 3, 1856, to aid in the construction of a railroad from Ontonagon to the Wisconsin State line, and acts amendatory thereof and supplemental thereto."

The amendment was agreed to.

* * * * * *

The bill as amended was ordered to a third reading; and it was accordingly read the third time, and passed.

The title of the bill was amended so as to read: "To forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon, in said State, and for other purposes."

Mr. HOLMAN moved to reconsider the vote by which which the bill was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

DEC. 21ST, 1888. The Senate refused to concur in the House amendments, and appointed conferees (Cong. Record, Dec. 23d, 1888, p. 468).

JANUARY 3D, 1889. The House agreed to the conference and appointed conferees (Cong. Record, Jan. 4th, 1889, p. 544).

MAY 1ST, 1889. In the Senate the following proceedings relative to forfeiture of railroad lands were had (Cong. Record, March 2d, 1889, p. 2746) :

Mr. PLUMB submitted the following report :

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 1430) to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows :

That the House recede from all after section 1 in the part proposed to be inserted in its amendment.

That the House recede from its disagreement to all after section 1 in the part proposed to be stricken out by its amendment and agree to the same amendment as follows :

"SEC. 2. That in all cases where persons are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed in good faith prior to January 1, 1886, they shall be entitled to purchase the same from the United States, in quantities not exceeding 320 acres to any one such person, at the rate of $2.50 per acre, at any time within two years from the passage of this act, and on making requisite proofs and payment to receive patents therefor : *Provided*, That in all cases where parties, persons, or corporations, with the permission of such State or corporation, or its assignees, are in the possession of, and have made improvements upon, any of the lands hereby resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to remove all buildings and other movable improvements from said lands : *And provided further*, That the provisions of this section shall not apply to any lands situate in the State of Iowa, on which any person in good faith has made or asserted the right to make a pre-emption or homestead settlement.

"SEC. 3. That if it shall be found that any lands heretofore granted to the Northern Pacific Railroad Company and so resumed by the United States and restored to the public domain lie north of the line known as the 'Harrison line,' being a line drawn from Wallula, Wash., easterly to the southeast corner of the northeast one-fourth of the southeast quarter of section 27, in township 7 north, of range 37 east, of the Willamette meridian; all persons who had acquired in good faith the title of the Northern Pacific Railroad Company to any portion of said lands prior to July 1, 1885, or who at said date were in possession of any portion of lands or had improved the same, claiming the same under written contract with said company, executed in good faith, or their heirs or assigns, as the case may be, shall be entitled to purchase the lands so acquired, possessed, or improved, from the United States, at any time prior to the expiration of one year after it shall be finally determined that such lands are restored to the public domain by the provisions of this act at the rate of $2.50 per acre, and to receive patents therefor upon proof before the proper land office of the fact of such acquisition, possession or improvement, and payment therefor, without limitation as to quantity: *Provided*, That the Attorney-General of the United States is hereby directed to cause proper legal proceedings to be instituted and prosecuted to final determination, to determine whether the aforesaid lands are or are not adjacent to constructed road within the meaning of this act, and are or are not hereby restored to the public domain, and such proceedings shall, upon motion of either party, be advanced for hearing in any court in which the same may be pending: *Provided further*, That the rights of way and riparian rights described in the deed executed by the city of Portland, in the State of Oregon, by the Northern Pacific Railroad Company and the Central Trust Company of New York, dated August 8, 1886, and which are described as follows: A strip of land 50 feet in width, being 25 feet on each side of the center line of a water-pipe line, as the same is staked out and located, or as it shall be hereafter finally located according to the provisions of an act of the Legislative Assembly of the State of Oregon approved November 25, 1885, providing for the means to supply the city of Portland with an abundance of good, pure, and wholesome water over and across the following described tracts of land: Section 19 and 31, in township 1 south,

of range 6 east; sections 25, 31, 33, and 35, in township 1 south, of range 5 east; sections 3 and 5, in township 2 south, of range 5 east; section 1, in township 2 south, of range 4 east; sections 23, 25, and 35, in township 1 south, of range 4 east, of the Willamette meridian, in the State of Oregon, forfeited by this act, are hereby as to such right of way and riparian rights granted and confirmed unto the said city of Portland, in the State of Oregon, its successors and assigns forever, with the right to enter on the hereinbefore described strip of land, over and across the aboved-described sections for the purpose of constructing, maintaining, and repairing a water-pipe line as aforesaid.

"SEC. 4. That nothing in this act shall be construed as forfeiting any lands that have been heretofore earned by the location and construction of any portion of a railroad under any act of Congress making a grant of public lands in the State of Michigan: *Provided*, That such lands lie opposite such constructed road, or if indemnity lands are provided in such grants the same shall be selected from the public lands within such indemnity limits lying nearest to such constructed road: *And provided further*, That this act shall not be construed to prejudice any right of the Portage Lake Canal Company, or the Ontonagon and Brule River Railroad Company, or any person claiming under them, to apply hereafter to the courts or to Congress for any legal or equitable relief to which they may now be entitled, nor to prejudice any right of forfeiture, as hereby declared, or recovery of the United States in respect of any of the lands claimed by said companies, nor to the prejudice of the right of any person claiming adversely to said companies or their assigns, under the laws of the United States.

"SEC. 5. That in all cases where lands included in a grant of land to the State of Mississippi, for the purpose of aiding in the construction of a railroad from Brandon to the Gulf of Mexico, commonly known as the Gulf and Ship Island Railroad, have heretofore been sold by the officers of the United States for cash, or with the allowance or approval of such officers have been entered in good faith under the pre-emption or homestead laws, the right and title of the persons holding or claiming any such lands under such sales or entries are hereby confirmed. And on condition that the Gulf and Ship Island Railroad Company within sixty days from the passage of this act shall, by resolu-

tion of its board of directors, duly accept the provisions of the same and file with the Secretary of the Interior a valid relinquishment of all said company's interest, right, title and claim in and to all such lands as have been sold or entered as aforesaid, then the forfeiture declared in the first section of this act shall not apply to or in any wise affect so much and such parts of said grant of lands to the State of Mississippi as lie south of a line drawn east and west through the point where the Gulf and Ship Island Railroad may cross the New Orleans and Northeastern Railroad in said State, until two years after the passage of this act.

"SEC. 6. The price of the even sections of the public lands not reserved within the limits of the portions of the several grants hereby forfeited, and within the limits of all grants or portion of grants heretofore forfeited, and of all lands hereby and heretofore forfeited, is hereby fixed at $1.25 per acre.

"SEC. 7. That section 5 of an act, entitled 'An act for a grant of lands to the State of Iowa in alternate sections, to aid in the construction of a railroad in said State,' approved May 12, 1864, and section 7 of an act entitled 'An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes,' approved March 3, 1865, and also section 5 of an act entitled 'An act making an additional grant of lands to the State of Minnesota in alternate sections, to aid in the construction of railroads in said State,' approved July 4, 1866, so far as said sections are applicable to lands embraced within the indemnity limits of said grants, be, and the same are hereby, repealed; and so much of the provisions of section 4 of an act approved June 2, 1864, and entitled 'An act to amend an act entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," approved May 15, 1856,' be, and the same are hereby, repealed so far as they require the Secretary of the Interior to reserve any lands but the odd sections within the primary or 6 miles granted limits of the road mentioned in said act of June 2, 1864, or to the act to which the same is amendatory.

"SEC. 8. That all actual settlers on any of the public lands in the State of Florida affected by the grants, who made actual settlement on any of said lands, after the time limited in the granting act for the construction of said road, and before May 1, 1888, shall have the

right to perfect their entries, respectively, under the homestead and pre-emption laws: *Provided*, That the title to the land described in the act entitled 'An act granting lands to the States of Alabama and Florida to aid in the construction of certain lines of railway in said States,' approved the 17th of May, 1856, which lies adjacent to the part of the lines of railroad built under and in pursuance of the act of the State of Florida entitled 'An act to encourage a liberal system of internal improvements in the State of Florida,' approved January 5, 1855, within the time limited by Congress in the granting act, and which were granted to any of the said companies by the Legislature of the State of Florida in accordance with said act of Congress, and are held by purchase in good faith from said companies, made before the year 1866, are hereby confirmed to such purchasers: *Provided*, That a mortgage or pledge of said lands by any of said companies shall not be considered as a sale for the purpose of this act.

"SEC. 9. That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior, under color of the public land laws, where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: *Provided, however*, That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

"SEC. 10. That no lands declared forfeited to the United States by this act shall inure to the benefit of

any State or corporation to which lands may have been granted by Congress except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to waive or release in any way any right of the United States now existing to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line.

"SEC. 11. That all persons who may have settled upon and are now in possession of the lands hereby forfeited, and who may desire to enter the same under the homestead law, shall be allowed, when making final proof, for the time they have already resided upon and cultivated the same."

On so much of the amendment of the House as relates to the first section of the bill, the committee are unable to agree.

P. B. PLUMB,
J. N. DOLPH,
E. C. WALTHALL,
Managers on the part of the Senate.
WM. S. HOLMAN,
L. E. PAYSON,
Managers on the part of the House.

The Senate concurred in the report, and as to the points of difference still remaining, insisted in its disagreement to the further amendment of the House, and Mr. PLUMB, Mr. DOLPH and Mr. WALTHALL were appointed managers at the further conference on the part of the Senate (Cong. Record, March 2d, 1889, p. 2760).

MARCH 3D, 1889. In the Senate, the following proceedings were had (Cong. Record, March 5th, 1889, p. 2948):

Mr. PLUMB submitted the following report:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 858) to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon, in said State, having met, after full and free conference have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendments of the House numbered 1, 2, 3, 4, 5, and 6, and agree to the same with an amendment as follows: Strike out all after the enacting clause and insert in lieu thereof as follows:

"That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to the State of Michigan by virtue of an act entitled 'An act making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes,' which took effect June 3, 1856, which are opposite to and coterminous with the uncompleted portion of any railroad to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain: *Provided*, That this act shall not be construed as forfeiting the right of way or depot grants of any railroad company heretofore granted; *And provided further*, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March 3, 1887, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

SEC. 2. That nothing in this act shall be construed as forfeiting any lands that have been heretofore earned by the location and construction of any portion of any railroad hereinbefore mentioned under any act of Congress making a grant of public lands in the State of Michigan: *Provided*, That such lands lie opposite such constructed road, or if indemnity lands are provided in

such grants the same shall be selected from the public lands within such indemnity limits lying nearest to such constructed road: *And provided further*, That this act shall not be construed to prejudice any right of the Portage Lake Canal Company, or the Ontonagon and Brule River Railroad Company, or any person claiming under them, to apply hereafter to the courts or to Congress for any legal or equitable relief to which they may now be entitled, nor to prejudice any right of forfeiture, as hereby declared, or recovery of the United States in respect of any of the lands claimed by said companies, nor to the prejudice of the right of any person claiming adversely to said companies or their assigns, under the laws of the United States.

SEC. 3. That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior, under color of the public-land laws, where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: *Provided, however*, That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were bona fide pre-emption or homestead claims on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

SEC. 4. That no lands declared forfeited to the United States by this act shall inure to the benefit of any State or corporation to which lands may have been granted by Congress except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to waive or release in any way any right of the United States now existing to have any other lands granted by them, as

recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line.

"SEC. 5. That all persons who may have settled upon and are now in possession of any of the lands hereby forfeited, and who may desire to enter the same under the homestead law shall be allowed, when making final proof, for the time they have already resided upon and cultivated the same."

And the House agree to the same.

P. B. PLUMB,
H. W. BLAIR,
Managers on the part of the Senate.
WM. S. HOLMAN,
J. L. MACDONALD,
L. E. PAYSON,
Managers on the part of the House.

The PRESIDENT *pro tempore*. Is there objection to the present consideration of this report?

Mr. EDMUNDS. Not at all—no objection, but I would like my friend to explain it.

Mr. PLUMB. This is the bill as it passed the Senate which has heretofore been under consideration, except that it refers only to lands in the State of Michigan as to which it forfeits what are known technically and actually as the unearned lands only. It then proceeds to settle also the controversy which existed in the State with reference to the conflicting claims of persons claiming under the State in the shape of holders of the rights of the Portage Lake Canal Company grant, and the persons who have made what are known as cash entries, and those who claim under the homestead or pre-emption laws, and it adopts as to all these classes of claims the compromise or adjustment which has heretofore been adopted by the Senate. It disposes of all the land grants in the State of Michigan.

Mr. EDMUNDS. I ask the Senator, with his permission, what arrangement has been made as to the rights of the railroad companies as between themselves and the United States in regard to not completing their roads within the time specified in the granting acts?

Mr. PLUMB. It gives them all the lands to which they would have been entitled if they had completed the roads within the time named in the granting acts.

Mr. EDMUNDS. As to construction already made?

Mr. PLUMB. Yes, as to the construction they have already made.

Mr. EDMUNDS. Does it protect the rights of the settlers?

Mr. PLUMB. It protects the rights of the settlers and all other claimants under the United States or under the State of Michigan or under the railroad companies. I move the adoption of the report.

The PRESIDENT *pro tempore*. If there be no objection to the present consideration of the report, the question is on agreeing to the same.

The report was concurred in.

In the House, on the same day, the same report was presented by Mr. HOLMAN, and the following proceedings were had thereon (Cong. Record, March 5th, 1889, pp. 2951, 2952):

Mr. HOLMAN. This has been agreed to by the whole delegation from Michigan.

Mr. STONE, of Missouri. I desire to ask my friend from Indiana a question.

Mr. HOLMAN. Certainly.

Mr. STONE, of Missouri. It is hard to hear the reading of the bill for information, and I ask for information if in extent this bill refers exclusively to the roads in Michigan?

Mr. HOLMAN. To Michigan alone.

Mr. STONE, of Missouri. Then I think this bill ought to pass.

Mr. ALLEN, of Michigan. Everybody from Michigan has agreed to it.

The report of the committee of conference was agreed to.

Mr. HOLMAN moved to reconsider the vote by which the conference report was agreed to; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

[NOTE. The references to pages in the foregoing compilation are to the "Congressional Record," as published from day to day, and not to the bound volumes.]

JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894.

LAKE SUPERIOR SHIP CANAL RAILWAY & IRON COMPANY, Plaintiff in Error, vs. WALTER CUNNINGHAM.	No. 49.
THE SAME vs. HUGH FINAN.	No. 50.
MICHAEL DONAHUE, Plaintiff in Error, vs. THE LAKE SUPERIOR SHIP CANAL RAILWAY & IRON COMPANY.	No. 51.

Brief of Don M. Dickinson, for Cunningham, Finan and Donahue.

DETROIT:
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1894.

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MICHAEL DONAHUE, Plaintiff in Error, vs. THE LAKE SUPERIOR SHIP CANAL RAILWAY & IRON COMPANY.	No. 51.

Brief and Argument for Cunningham, Finan and Donahue.

The actions were ejectment, and these three cases, out of a number, were selected as test ones, because together they covered every phase of the controversy between the Canal Comp ny and the Homesteaders.

The Cunningham case was first tried at Circuit; the other cases, with others, awaiting the result. The first trial re-

sulted in a verdict for the Canal Company by direction of the Court.

A motion for a new trial was entered, which came on for hearing at Circuit before Jackson, Brown and Severens, JJ. All the questions involved were exhaustively argued on elaborate briefs by both sides, and the opinions of the learned judges granting a new trial, together with the dissenting opinion of Judge Severens, are printed in the Cunningham record at pp. 12, 26 and 32.

The second trial of the Cunningham case resulted in a verdict for the defendant by direction of the Court, and the cases of Finan and Donahue were tried immediately in succession on substantially the same testimony as the Cunningham case, (differing only on the respective descriptions of land, and the possession), and resulted by direction of the Court, the one in a verdict for the defendant, and the other (the Donahue case) in a verdict for the plaintiff.

At the second trial below the learned Court distinguished the Finan and Donahue cases on some very simple questions which were not expressly and in terms decided in the opinion of the Court granting the new trial.

In our view these questions were essentially concluded by that opinion.

These distinctions may be stated as follows:

THE FINAN CASE DISTINGUISHED FROM THE CUNNINGHAM CASE.

The Congress passed a forfeiture act, approved March 2, 1889, applying especially to an unearned railroad land grant, (covering the lands in question in these three cases) in the Upper Peninsula of Michigan.

CUNNINGHAM had made his pre-emption settlement, and filed his claim for it, prior to the commencement of this suit, to wit: Settlement on land, March 12, 1888; formal

pre-emption entry, May 25, 1888; renewed, April 27, 1889, and still pending.

This action of ejectment was commenced on *July 23, 1888*, before the passage of the Forfeiture Act of March 2, 1889.

FINAN made his settlement May 14, 1888; pre-emption application November 23, 1888; renewed May 1, 1889, and still pending.

This suit (that of Finan) was commenced *March 30, 1889*, and after the passage of the Forfeiture Act.

The Court below (see charge, Record, p. 41, folio 77), distinguished on the ground that the Cunningham case was commenced before the passage of the above cited forfeiture act, while the Finan suit was commenced afterwards, but directed a verdict for Finan.

THE DONAHUE CASE DISTINGUISHED FROM THE CUNNINGHAM AND FINAN CASES.

While Donahue's was the oldest settlement of the three, (made February 25, 1883, and the oldest application, made April 11, 1883—renewed May 1, 1889) and the oldest suit —commenced July 25, 1885, and, so far, entirely within the principle of the charge of the Court favorable to Cunningham, yet this distinction was made by the Court:

The land grant in question was that conferred upon the ONTONAGON and State Line Railroad Company under the act of Congress of June 3, 1856, to build a line from *Ontonagon* in the State of Michigan to the Wisconsin State line. The grant was in these words: "Every alternate section of "land designated by odd numbers, for six sections in width "on each side of said roads."

By the same act, in the same terms as above quoted, there were grants for other lines of railroads, and among others, for a line from MARQUETTE in the State of Michigan to the

Wisconsin State line, which was conferred upon the Marquette and State Line Railroad Company.

The *Ontonagon* and State Line Railroad Company was organized first, August 20, 1856, and first filed its map of definite location.

The *Marquette* and State Line Railroad Company was organized June 16, 1857, and originally filed its map of definite location so that its line at one point *intersected* with the line of the *Ontonagon* and State Line Railroad. In these conditions, the Land Office certified to each company its allotment under the act separately up to the point of intersection, and then for the length of the intersection, certified a separate and distinct list of lands to both roads in common.

Subsequently, and before any railroad was built, the *Marquette* and State Line Railroad, by consent of the Congress and of the Legislature of the State of Michigan, changed its line so that at no point did it intersect, or come within the granting limits of the *Ontonagon* and State Line route, and, under the act of Congress, on its releasing any interest in the lands certified for the old route, received its full complement of lands along the new line.

It—The *Marquette* and State Line Company—and its successors, never assumed to release or convey back any lands or interest in lands except what had been conferred upon it, or certified to it along its original line.

The *Ontonagon* and State Line road, however, never changed its line of definite location.

The *Marquette* and State Line road, as changed, was fully completed, and received its full complement of lands under the grant. The *Ontonagon* and State Line road was never built.

The forfeiture act of March 2, 1889, forfeited all lands granted by the act of 1856 "opposite to and co-terminous "with the uncompleted portion of any railroad, to aid in

"the construction of which said lands were granted or ap-"plied."

Now, the settlements of Cunningham and Finan were made upon the lands in what are known as the "clear limits" of the route of the *Ontonagon* and State Line road (never built), i. e., where that line was clear, for six sections in width, on each side, of the original and abandoned line of the *Marquette* and State Line route.

Donahue's settlement was made within what are known as the "common limits," i. e., where the old, abandoned route of the *Marquette* and State Line Railroad Company did so intersect with the unchanged line of the *Ontonagon* and State Line Railroad Company.

Because of this difference between the locations of Donahue and those of Cunningham and Finan, the Court directed a verdict against Donahue, holding that certain release to the general government, executed in behalf of the *Marquette* and State Line Railroad Company and its successors, although ineffectual as against Cunningham and Finan, in so far as the releases covered lands in the "clear limits," were valid as against Donahue as to lands so as aforesaid within the old "common limits" of the two original routes.

(See charge below, p. 41, folio 77.)

The elements of the origin of the controversy are three in number, and may be stated as follows:

[1.]

The lands are embraced in a grant made by Congress to the State of Michigan on June 3, 1856, of 142,430.32 acres in the "clear limits," (besides several thousand acres in the

"common limits," as above explained), to aid in the construction of a railroad between *Ontonagon* in the State of Michigan and the Wisconsin State line, no part of which was ever built, the title of the State never having been divested by any forfeiture asserted, "Either through judi-"cial proceedings instituted under authority of law for "that purpose, or through some legislative action equiva-"lent to judgment of office found at common law," (St. Louis R. R. vs. McGee, 115 U. S., p. 473) until the forfeiture by the act of Congress of March 2, 1889.

The distinction between this line of road, and the name of it, between Ontonagon and the Wisconsin State line, must be kept steadily in view throughout the case, without confusion with any other line of road, and especially with the Marquette and Wisconsin State Line road, which was fully constructed. The act of March 2, 1889, was aimed at this grant alone, and affects this grant alone of all the lands granted to the State of Michigan for the construction of railroads by the act of June 3, 1856.

[2.]

The plaintiff Canal Company, under color of a grant of lands "of the United States" to the Stae of Michigan, by an act of Congress approved July 3, 1866, to aid in the construction of a canal, assumed to select as a portion of its grant [Record, folio 211] of 400,000 acres, 15,000 acres of the lands so as above granted and certified by description to the State of Michigan for railroad purposes by the act of June 3, 1856, in the "clear limits" of the Ontonagon and State line route, besides other land on which Donahue settled in the "common limits" as heretofore described

The Canal Company made such selections on May 19, 1871, and procured them to be certified by the Commissioner of the Land Office for the purposes of the canal grant on May 22, 1871.

[3.]

On a small portion of these lands so as aforesaid granted and certified to the State for railroad purposes, the defendants, and a number of other citizens of Michigan, proceeding in due form under the pre-emption laws of the United States, assuming that as the railroad had not been built, the whole grant was unearned, and was forfeited, without notice of any claim of the Canal Company, but settling, as their neighbors did on other parts of the unearned railroad grant which had *not* been selected by the Canal Company, made settlements with their families, built houses, cleared land, raised crops, and made other valuable improvements. Those affected constitute a community.

These settlers are protected in terms by the act of Congress approved March 2, 1889, forfeiting the said original railroad grant. But contention is made as to the construction of this act, the Canal Company claiming confirmation of their title under it.

(Brief and argument resumed at p. 27.)

For convenience of reference and comparison, we here print the acts of Congress and of the State of Michigan bearing upon the controversy.

THE ACT OF CONGRESS, APPROVED MARCH 2, 1889, FORFEITING THE UNEARNED LANDS GRANTED FOR RAILROAD PURPOSES BY THE ACT OF JUNE 3, 1856, UNITED STATES STATUTES AT LARGE, VOL. 25, CHAP. 414, P. 1008.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Forfeiture of unearned lands granted to railroads in Michigan.

That there is hereby forfeited to the United States, and

the United States hereby resumes the title thereto all lands heretofore granted to the State of Michigan by virute of an act entitled "An act making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State and for other purposes," which took effect June 3, 1856, *which are opposite to and co-terminus with the uncompleted portion of any railroad*, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain;

Restored to public domain.

Provided, That this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted;

Rights of way, etc.

And provided further, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

Settlers' rights limited.

Sec. 2. That nothing in this act shall be construed as forfeiting any lands that have been heretofore earned by the location and construction of any portion of any railroad hereinbefore mentioned under any act of Congress making a grant of public lands in the State of Michigan.

Lands earned by construction not forfeited.

Provided, That such lands lie opposite such constructed road, or if indemnity lands are provided in such grants the same shall be selected from the public lands within such indemnity limits lying nearest to such constructed road:

Location.

And provided further, that this act shall not be construed to prejudice any rights of the Portage Lake Canal Company, or the Ontonagon and Brule River Railroad Company, or any person claiming under them, to apply hereafter to the courts or to Congress for any legal or equitable relief to which they may now be entitled, nor to predjudice any right of forfeiture, as hereby declared, or recovery of the United States in respect of any of the lands claimed by said companies, nor to the prejudice of the right of any person claiming adversely to said companies or their assigns, under the laws of the United States.

Rights of legal or equitable relief not impaired.

Sec. 3. That in all cases when any of the lands forfeited

by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior, *under color of the public land laws*, where the consideration received therefor is still retained by the government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby confirmed;

Confirmation of certain lands disposed of.

Provided, however, that where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were bona fide pre-emption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

Cash purchasers.

Pre-emption and homestead claims.

Sec. 4. *That no lands declared forfeited to the United States by this act shall inure to the benefit of any State or corporation to which lands may have been granted by Congress except as herein otherwise provided*; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to waive or release in any way any right of the United States now existing to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant. *Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line*

Disposition of forfeited lands.

Sec. 5. That all persons who may have settled upon and are now in possession of any of the lands hereby forfeited, and who may desire to enter the same under the homestead law, shall be allowed, when making final proof, for the time they have already resided upon and cultivated the same.

Present settlers allowed to make entry for time of residence.

THE ORIGINAL ACT OF CONGRESS OF JUNE 3, 1856, GRANTING LANDS IN TRUST TO THE STATE OF MICHIGAN FOR RAILROAD PURPOSES, REFERRED TO IN THE FORFEITURE ACT OF MARCH 2, 1889. UNITED STATES STAT. AT LARGE, VOL. 11, CHAP. 44, PAGE 21.

Grant of land to Michigan for railroads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That there be and hereby is granted to the State of Michigan, to aid in the construction of railroads from Little Bay de Noquet to *Marquette, and thence to Ontonagon, and from the two last named places to the Wisconsin State line;* and alson from Amboy, by Hillsdale and Lansing, and from Grand Rapids to some point on or near Traverse Bay; also from Grand Haven and Pere Marquette to Flint, and thence to Port Huron, every alternate section of land designated by odd numbers; for six sections in width on each side of each of said roads; but in case it shall appear that the United States have, when the lines or routes of said road are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached as aforesaid; which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Michigan for the use and purpose aforesaid; Provided, That the lands to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for, and on account of each of said roads; Provided further, That the lands hereby granted shall be exclusively applied in the construction of that road for and on acount of which such lands are hereby granted, and shall be disposed of only as the work progresses, and *the same shall be applied to no other purpose whatsoever;* And provided

Grant in lieu of sections sold or pre-empted.

Land, how applied.

further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Act not to apply to reservations except as to right of way.

Sec. 2. And be it further enacted, That the sections and parts of sections of land which, by such grant, shall remain to the United States, within six miles on each side of each of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

Price of alternate sections doubled.

Sec. 3. And be it further enacted, *That the said lands hereby granted to the said State, shall be subject to the disposal of the Legislature thereof, for the purposes aforesaid and no other;* and the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

Object of grant.

Railroads to be a public highway for government.

Sec. 4. And be it further enacted, That the lands hereby granted to said State shall *be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold;* and when the governor of said State shall certify to the Secretary of the Interior that any twenty coninuous miles of any of said roads is completed, then another quantity of land hereby granted, *not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid,* and included within a continuous length of twenty miles of each of such roads may be sold; and so from time to time until said roads are completed; *and if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States.*

Lands how disposed of

Sec. 5. Transportation of mails.

ACT OF THE LEGISLATURE OF MICHIGAN OF FEBRUARY 14, 1857, ACCEPTING AND DISPOSING OF THE ABOVE GRANT IN ACCORDANCE WITH THE ACT OF CONGRESS. LAWS OF MICHIGAN, 1857, ACT NO. 126, PP. 346 TO 354.

Grant of lands by Congress accepted.

Sec. 1. *The People of the State of Michigan enact*, That the lands, franchises, rights, powers and privileges granted to and conferred upon the State of Michigan, by an act of Congress entitled, "An act making a grant of alternate sections of land to the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes, approved June 3, 1856, be and the same are hereby accepted with the restrictions, and upon the terms and conditions contained in said act of Congress.

Sec. 2. So much of the aforesaid lands, franchises, rights, powers and privileges as are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Amboy by the way of Hillsdale and Lansing, to some point on or near Traverse Bay, are hereby disposed of, granted to, conferred upon, and vested in the Amboy, Lansing and Traverse Bay Railroad Company; in like manner all the lands, franchises, rights, powers and privileges, which are, or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Grand Haven to Flint, and thence to Port Huron, are hereby vested fully and completely in the Detroit and Milwaukee Railway Company, and in the Port Huron and Milwaukee Railway Company, in the manner following, to wit: So much of said lands as pertain or attach to said route from Grand Haven to Owosso, in the County of Shiawassee, are hereby vested fully and completely in the Detroit and Milwaukee Railway Company, and so much of said lands as pertain or attach to said route from Owosso to Flint and thence to Port Huron, are hereby vested fully and completely in the Port Huron and Milwaukee Railway Company, to aid in the construction of the roads of said companies respectively; in like manner all the lands, franchises, rights, powers and privileges which are, or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Pere Marquette to Flint, and thence to Port Huron are hereby vested fully and completely in the Flint and Pere Marquette Railway Company and in the Port Huron and Milwaukee Railway Company

Grant to Amboy Lansing and Traverse Bay railroad company.

To Detroit & Milwaukee Railway company.

To Port Huron & Milwaukee Railroad.

To Flint & Pere Marquette Railway company and Port Huron & Milwaukee Railway company.

according to the provisions of the act of Congress relating thereto, and the direction of the board of control hereby appointed; in like manner all the lands, franchises, rights, powers and privileges as are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Grand Rapids to some point on or near Traverse Bay, are hereby vested fully and completely in the Grand Rapids and Indiana Railroad Company; *in like manner all the lands, franchises, rights, powers and privileges which are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Marquette to the Wisconsin State line, be and the same are hereby vested fully and completely, in the Marquette and State Line Railroad Company;* IN LIKE MANNER ALL THE LANDS, FRANCHISES, RIGHTS *powers and privileges which are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Ontonagon to the Wisconsin State line, are hereby vested fully and completely in the Ontonagon and State Line Railroad Company;* in like manner all the lands, franchises, rights, powers and privileges which are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Little Bay de Noquet to Marquette, are hereby vested fully and completely in the Bay de Noquet and Marquette Railroad Company; in like manner all the lands, franchises, rights, powers and privileges which are or may be granted and conferred in pursuance of said act of Congress to aid in the construction of a railroad from Marquette to Ontonagon, are hereby vested fully and completely in the Marquette and Ontonagon Railway Company. All and each of the several railroad companies mentioned in this section shall be subject to all the conditions, restrictions and obligations imposed upon them by this act as hereinafter provided.

To Indiana Railroad Co.

To Marquette and State Line Railroad Co.

To Ontonagon and State Line Railroad Co.

To Bay de Norquet and Marquette R. R. Co.

To Marquette & Ontonagon R. R. Co.

Subject to conditions and restrictions.

Sec. 3. The lands, franchises, rights, powers and privileges, hereby conferred upon and vested in said railroad companies, or either of them, shall be exclusively applied in the construction of their respective lines of railroad, as, above designated, and said lands shall be applied to no other purposes whatsoever; and each and every one of said railroads, when completed, shall in all respects, and in all its parts, be a first-class railroad; and the rail thereof shall be the "T" or continuous rail.

Lands, etc., to be exclusively applied to construction of respective roads.

T rail.

* * * * * * * *

Section 4 povides that the railroads shall be public highways for the use of the United States.

Sec. 5. Companies required to accept lands, etc.

Roads must be located by 1st Dec., 1857.

Sec. 6. It shall be the duty of each of said railroad companies on or before the first day of December next, to locate the line of its railroad, and to make complete maps of said line, and to file copies of such maps in the offices of the Governor and Secretary of State of Michigan; and it shall be the duty of the Governor, after affixing his official signature to the duplicate map of each of said roads, to file them in the department having control of the public lands in the city of Washington; said lines so located shall not be considered absolutely final, further than to fix the limits and boundaries within which said lands may be selected, but said company shall have the right to make alterations thereof when necessary to improve said line; Provided, such alterations shall not materially change or alter such road.

Duty of Governor.

Proviso.

When companies shall sell 60 sections of land.

Sec. 7. Each of said companies *after the completion of twenty continuous miles* of its railroad, and after the Governor shall have certified to the Secretary of the Interior that such twenty continuous miles of its road are so completed *then and not before*, said company may sell sixty sections of land included within any continuous twenty miles of its line of road; and in like manner upon the completion of each other twenty continuous miles, it may sell other sixty sections; and so on from time to time until the whole of its road is completed; and after the full and final completion of the entire length of its road, and the acceptance of the same by the board of control herein provided; then the company may sell the remainder of the lands hereby invested in accordance with the act of Congress aforesaid, and not before; and none of the lands hereby granted to said several companies shall be liable to taxation for seven years from the first day of September next; except such parts and parcels hereof as shall be actually sold by said several companies, pursuant to the provisions of this act, or such as shall be improved.

When companies may sell remainder.

Lands exempted from taxation.

Board of control.

Sec. 8. For the purpose of securing the construction of the aforesaid railroads, within the time limited and in the manner prescribed in this act, and for the purpose of properly managing and disposing of the lands appropriated to aid in the construction thereof, the Governor of the State

of Michigan, together with six commissioners to be nominated by the Governor and confirmed by the Senate, are hereby constituted a board of control of the same, whose duty it shall be to manage and dispose of such lands in aid of the construction of the aforesaid railroads, in the manner in this act provided, and to do any and all other acts necessary and proper respecting the construction and building of said railroads, which shall be prescribed by law; the Governor shall be ex-officio the president of the said board; the commissioners shall hold their office from the time of their appointment until the fourth of March, 1861; any vacancies that may occur between the sessions of the Legislature, by death, resignation or otherwise shall be filled by the Governor until the first meeting of the Legislature after such vacancy shall occur. The commissioners shall receive five dollar a day and necessary expenses for each day that they shall be actually employed in the duties of their office; the amount of such allowance and expenses shall be apportioned among the different companies in such manner as the board shall deem equitable, and shall be paid by the several companies from time to time as the board may direct.

Duty of board.

Governor to be president of board.

Term of office.

Governor to fill vacancies.

Compensation of commissioners.

Sec. 9. If it shall appear that the lands that have been donated by the act of Congress aforesaid for the construction of said lines of said railroad cannot be obtained by any or either one of said railroad companies, within the limits of six miles on either side of its railroad line, the Governor shall from time to time appoint agents, upon the nomination of the presidents of the respective companies, to make such selection as may be authorized or granted by Congress for the line thereof; but the compensation of said agents, and the costs, expenses and reasonable charges attendant and occasioned by making such selections shall be paid and borne by the said company; Provided, however, That the compensation of agents shall not exceed five dollars a day besides necessary expenses.

Governor to appoint agents to select lands.

Compensation of agents and expenses to be borne by companies.

Proviso.

* * * * * * * *

Sec. 10. Lands in certain cases may be selected upon other parts of the line of road.

* * * * * * * *

Board of control may confer lands upon other parties in certain cases.

Sec. 11. Should either of said railroad companies fail to accept said lands on the terms of this act, within sixty days, or fail to make the survey and maps by the first day of December next, or fail to construct its entire line of road

or any part thereof, in the time and manner required, in such case said board of control shall have the power, and it is hereby made their duty, to declare said lands, so far as they have not been sold in good faith, forfeited to the State, and said board of control are hereby required to confer said lands upon some other competent party, under the general regulations and restrictions of this act.

* * * * * * * *

Sec. 12. Railroad companies to be subject to laws of State.

Sec. 13. Annual report of companies.

Sec. 14. Right of way through lands of State granted.

* * * * * * * *

Conflicting interests to be settled by board of control.

Sec. 15. *Whenever by the crossing of the several lines of railroad herein provided for, or by their running within less than thirty miles of each other, or from any other cause conflicting interest or claims shall arise between any of the aforesaid companies in the selection of their lands, such conflicting claims shall be settled by the Board of Control herein provided for, whose decisions shall be final in* all such cases.

* * * * * * * *

Sec. 16. Companies to have no claim against State.

Sec. 17. Full paid stock not to be issued until fully paid.

Sec. 18. Power of Marquette and State Line Railroad Company to purchase road from Iron Mountain Railway.

* * * * * * * *

20 miles per year to be constructed.

Sec. 19. Each and every one of the aforesaid railroad companies shall complete and put in good running order at least twenty continuous miles of its road, during each year from and after the first day of December next, and shall complete the entire length of its road within seven years from the fifteenth day of November next, *except the railroads in the upper peninsula herein named; and as to these, each and every one of them shall complete the first twenty miles of their several roads within three years from the first day of December next*, and the entire line of their roads within the time above limited. * * *

Exception.

* * * * * * * *

The remaining portion of section 19 provides for the completion of a certain portion of the Amboy, Lansing & Traverse Bay R. R. by November 1, 1859.

Sec. 20. Specific taxes. * * *

Sec. 21. All the roads constructed under the provisions of this act shall be the same breadth of guage with the Central and Southern railroads of this State, *except the railroads in the upper peninsula.** Breadth and guage. Exception.

Sec. 22. All companies operating roads under the provisions of this act shall keep and maintain all their principal offices within this State. Principal offices to be kept in this State.

This act is ordered to take immediate effect.

ACT OF THE LEGISLATURE OF THE STATE OF MICHIGAN, APPROVED MARCH 4, 1861, CHANGING THE LINE OF THE MARQUETTE AND STATE LINE RAILROAD, AND AUTHORIZING THE BOARD OF CONTROL OF THE STATE OF MICHIGAN, CREATED BY THE FOREGOING ACT, TO CONFER ITS GRANT UPON ANOTHER COMPANY. LAWS OF MICHIGAN, 1861, ACT NO. 90, P. 123.

Whereas, *The Marquette and State Line Railroad Company* have heretofore consolidated with the Chicago, St. Paul & Fond du Lac Railroad Company, of Wisconsin, and said company having become insolvent, and all its property in Wisconsin is transferred to another company; and whereas, the most practicable route for a railroad connecting Lake Superior with the system of railroads in Wisconsin, should be located on a different route from the one heretofore partially selected, namely: from Marquette to the mouth of the Menominee River; therefore, Preamble. Part of act repealed.

Section 1. The People of the State of Michigan enact, That for the purpose of placing the aforesaid lands, franchises, rights, powers and privileges, which are or may be granted in pursuance of said act of Congress, approved June third, 1856, *to aid in the construction of a railroad from Marquette to the Wisconsin State line*, near the mouth of the Menominee river, in a position to encourage the early construction of said road, do hereby repeal so much of section two of "an act to repeal section twenty of an act disposing of certain lands for railroad purposes, approved February 14, 1857," approved February 15, 1859,

*Unchanged as to roads in the Upper Peninsula by amendment March 25, 1865; Laws 1865, p. 683.

Board of control power and duty of.

as relates to the extension of the time to complete the first section of twenty miles of the *Marquette and State Line Railroad*, or any other act amendatory thereto, and do hereby place the same in charge of the board of control, who shall have power, and is hereby made their duty, to confer said lands, franchises, rights, powers and privileges upon some other competent party or company under the general regulation and restrictions of an act disposing of certain grants of land made to the State of Michigan for railroad purposes, by an act of Congress, approved June 3, 1856, and approved February 14, 1857, and all acts amendatory thereto.

The Board to divide the line of railroad.

Sec. 2. The board of control are hereby authorized to divide the line of railroad aforesaid into two equal parts, and to confer said lands, franchises, rights, powers and privileges to two different parties or companies, and to require each of them to construct, within one year from the passage of this act, at least ten miles consecutively of said line of railroad, and ten miles each succeeding year until the same is completed, or said transfer by the board of control shall be void, in which case the board of control shall have the right to confer the aforesaid lands, franchises, rights, powers and privileges to some other competent party.

Repeal.

Sec. 3. All acts or parts of acts contravening the provisions of this act are hereby repealed.

Sec. 4. This act shall take immediate effect.*

JOINT RESOLUTION OF CONGRESS, APPROVED JULY 5, 1862, PERMITTING THE CHANGE OF LINE OF THE MARQUETTE AND STATE LINE ROAD, AND CONFERRING A GRANT ALONG THE NEW LINE, AND PROVIDING FOR THE RELEASE BY THE STATE OF MICHIGAN, OF, AND THE PUBLIC SALE OF LANDS ALLOTTED TO THE OLD LINE. UNITED STATES STATUTES AT LARGE, 1862. VOL. 12, RES. NO. 38, P. 620.†

Words "Wisconsin State line" in act 1856, Ch. 44, Sec. 1, how to be construed. Vol. 11, p. 21.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That

*No reference in the act to the Ontonagon and State Line Company or its land grant, or its line.

†No reference in any way to the Ontonagon and State Line Company or its land grant, or its line.

the words "Wisconsin State Line" in the first section of an act entitled "An act making a grant of lands to the State of Michigan, in alternate sections, to aid in the construction of railroads in said State," approved June third, 1856, shall, without forfeiture to said State, or its assigns of any rights or benefits under said act, or exemption from any of the conditions or obligations imposed thereby, be construed to authorize the location of the line of railroad provided for in said act *from Marquette on Lake Superior, to the Wisconsin State line*, upon any *eligible route from the township of Marquette* aforesaid, to a *point on the Wisconsin State line*, near the mouth of the Menominee River, and touching at favorable points on Green Bay, with a view of securing a railroad favorable for military purposes from Green Bay to the waters of Lake Superior. *And the line of railroad as now located in pursuance of said act from Marquette to the Wisconsin State line, according to the records of the General Land Office* is hereby authorized to be changed so as to conform to the route above indicated; which line, when surveyed and the maps and plans thereof filed in the proper office, as required under said act of June 3, 1856, shall confer the same rights upon and benefits to the State of Michigan and its assigns in said new line, as though the same had been originally located under said act.

Line now located may be changed.

Sec. 2. And be it further resolved, That the provisions of an act of Congress, approved August 4th, 1852, entitled "An act to grant the right of way to all rail and plank roads and McAdamized turnpikes passing through the public lands belonging to the United States," be and the same are hereby extended so as to be applicable to the new line of railroad so as above to be located: Provided, the same shall be commenced within two years from the fourth day of August, 1862, and shall be completed within five years thereafter.

Provisions of act of 1852 Ch. 80, Extended, etc. Vol. X., p. 28.

Proviso.

Sec. 3. And be it further enacted, That the Secretary of the Interior be, and he is hereby authorized to cause all even sections or parts of even sections of public lands that may be brought within six miles of the new line of railroad, as herein provided for, to be sold at the same price and in the same manner those have or might have been, according to the said act of June 3, 1856, upon the originally located route of railroad. And all purchasers, or their heirs or assigns, within the six mile limits of said originally located route, who shall be more than six

Price of land bordering on railroad.

Purchasers on old line may exchange lands.

miles from the new line of route hereby authorized, and who have paid the sum of two dollars and fifty cents an acre, shall have the right either to exchange their locations upon the line as first established to the new line upon the same terms, in like quantities, and in the same manner as on the line first established, as aforesaid, or at their option to enter, without further payment, anywhere within the Marquette land district, in the State of Michigan, or that of the Grand Traverse land district, in said State, lying north or west of Lake Michigan, an additional quantity of public lands subject to private entry, at one dollar and twenty-five cents an acre, equal to the quantity entered by them at two dollars and fifty cents per acre, so that the lands originally entered by them shall be thus reduced to the rate of one dollar and twenty-five cents an acre.

Public lands on old line to be sold for $1.25 per acre.

Sec. 4. And be it further resolved, That the even sections of public lands reserved to the United States by the aforesaid act of June 3, 1856, along the originally located route of the *Marquette and Wisconsin State Line Railroad Company*, except where such sections shall fall within six miles of the new line of road so as aforesaid proposed to be located, and along which no railroad has been constructed, shall hereafter be subject to sale at one dollar and twenty-five cents per acre.

Rights of the State of Michigan in such lands.

Sec. 5 And be it further resolved, *That upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the lands, as aforesaid, set forth and described in the lists thereof thus certified*, and that the same have never been pledged or sold or in any wise encumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land, selected in like manner, *upon the new line of road as thus surrendered upon the first line*, and to the extent of six sections per mile in the aggregate for every mile of the new line, according to the general provisions of the act of June 3, 1856. And it shall be the duty of the Commissioner of the General Land Office to re-offer for public sale, in the usual manner, the lands embraced in the lists of surrendered lands aforesaid, when duly filed in his office, as herein directed.

ACT OF THE LEGISLATURE OF THE STATE OF MICHIGAN, APPROVED MARCH 18, 1863, CONFIRMING THE ACTION OF THE BOARD OF CONTROL IN CONFERRING THE LAND GRANT ALONG THE MARQUETTE AND STATE LINE ROAD, AS CHANGED, UPON THE PENINSULA RAILROAD COMPANY. LAWS OF MICHIGAN, 1863, ACT NO. 127, P. 186.

An act supplementary to an act entitled "an act disposing of certain grants of land made to the State of Michigan for railroad purposes by act of Congress, approved June 3, 1856," approved February 14, 1857, and acts amendatory thereto.

Section 1. The People of the State of Michigan enact, That the grant of lands conferred by the board of control upon the Peninsula Railroad Company *under authority of an act approved March 4, 1861, and upon the re-located route authorized* for military purposes *by resolution of Congress approved July 5, 1862*, is hereby confirmed unto the said Peninsula Railroad Company; Provided, it shall construct the railroad referred to according to the requirements of the act and resolution of Congress herein referred to. * Grant of lands confirmed. Proviso.

JOINT RESOLUTION OF THE LEGISLATURE OF MICHIGAN, APPROVED FEBRUARY 21, 1867, AUTHORIZING THE GOVERNOR TO SURRENDER THE LANDS ON THE OLD ORIGINAL LINE OF THE MARQUETTE AND WISCONSIN STATE LINE RAILROAD. LAWS OF MICHIGAN, 1867, VOL. 1, RES. NO. 16, P. 317.†

Joint resolution authorizing the Governor to execute the certificate of non-incumbrance and surrender of the lands on the *original line of the Marquette and Wisconsin State line of railroad.*

Whereas, By act of Congress, approved June 3, 1856, there was made among other grants to the State *a grant of land* to and in the construction of a railroad *from Marquette to the Wisconsin State line;*

And whereas, By joint resolution of Congress, approved

*Identifying the lands by the acts referred to, and thus excluding any implication of reference to Ontonagon and State Line grant.

†No reference to Ontonagon and State Line Company line or grant and any implication of reference excluded.

July 5, 1862, a *change of the route of said road* was authorized, and in fact has been made.

And whereas, The company have executed a *release of said land* to the Governor; therefore,

Resolved by the Senate and House of Representatives of the State of Michigan, That the Governor be and he is hereby authorized to execute and file the certificate of non-incumbrance and surrender to the United States *of the land on the original line of said railroad* required by said joint resolution.

CANAL GRANTS.

200,000 ACRES WERE GRANTED BY THE FOLLOWING ACT OF CONGRESS, APPROVED MARCH 3, 1865. UNITED STATES STATUTES AT LARGE, VOL. 13, CHAP. 102, P. 519.

An act granting land to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior.

The State of Michigan may locate, etc., a ship canal, etc., through "The Portage."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby granted to the State of Michigan the right of locating and constructing a breakwater and harbor and ship canal through any *public lands* at or upon the neck of land on Lake Superior known as "The Portage;" Provided, That not more than one thousand feet in width on the bank of Lake Superior shall be occupied by said breakwater and harbor, and that a strip of land not more than four hundred feet in width on said neck of land shall be occupied by said canal; And provided, That said ship canal shall be at least one hundred feet in width, with a depth of water not less than thirteen feet.

Limit to grant.

Width and depth of canal.

Grant to Michigan of public lands to aid in building ship canal.

Sec. 2. And be it further enacted, That there be and hereby is granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing a harbor and ship canal to connect the waters of Lake Superior with the waters of Portage Lake, *two* hundred

thousand acres of *public lands*, to be selected in subdivisions agreeably to the United States survey, by an agent or agents appointed by the Governor of said State, subject to the approval of the Secretary of the Interior FROM ANY LANDS IN THE UPPER PENINSULA OF SAID STATE SUBJECT TO PRIVATE ENTRY: Provided, That said selections shall be made from alternate odd-numbered sections of land nearest the location of said canal in said upper peninsula, not otherwise appropriated, and not from lands designated by the United States as "mineral" before the passage of this act, nor from lands to which the rights of preemption or homestead have attached.

How and where selected.

Proviso.

Sec. 3. And be it further enacted, That the said lands hereby granted shall be subject to the disposal of the legislature of said state, or, if the legislature thereof shall not be in session, or shall adjourn within ten days after the passage and approval of this act, then said lands shall be subject to the disposal of the Governor and board of control of said State, for the purpose aforesaid and for no other; and the said canal shall be and remain a public highway for the use of the government of the United States, free from toll or charge upon the vessels of said government, or upon vessels employed by said government in the transportation of any property or troops of the United States.

Lands granted to be subject to disposal by the State.

Canal to be public highway and no charge to United States vessels.

Sec. 4. And be it further enacted, That before it shall be competent for said State to dispose of any of said lands, to be selected as aforesaid, the plan of said breakwater and harbor, and the route of said canal shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof in the office of the commissioner of the general land office.

Route of canal to be established before lands are disposed of.

Sec. 5. And be it further enacted, That if the said breakwater, harbor, and ship canal shall not be completed within two years from the passage of this act, the lands hereby granted shall revert to the United States.

Unless canal, etc., completed in 2 years land to revert.

Sec. 6. And be it further enacted, That the Legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted, and of all expenditures in the construction, repairs and operating of said canal, and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior; and whenever said State shall be fully reimbursed for all advances made for the construction, repairs and operating of said canal with legal interest

Account of sales of land and net proceeds and earnings and expenditures to be kept.

When State reimbursed tolls to be such only as shall pay expenses of canal.

on all advances, until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said State shall be allowed to tax for the use of said canal only such tolls as shall be sufficient to pay all necessary expenses for the care, charge and repair of the same.

July 3, 1866. Lands granted to Michigan for a harbor and ship canal at Portage Lake.

200,000 ACRES MORE GRANTED FOR CANAL PURPOSES BY THE FOLLOWING ACT, APPROVED JULY 3, 1866. UNITED STATES STATUTES AT LARGE, VOL. 14, CHAP. 161, P. 81.

An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is granted to the State of Michigan to aid in the building of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in addition to a former grant for that purpose, approved March the third, 1865, two hundred thousand acres of land in the upper peninsula of the State of Michigan, and from land to which the right of homestead or pre-emption has not attached: Provided, That one hundred and fifty thousand acres of said lands shall be selected from alternate odd-numbered sections, and fifty thousand acres from even-numbered sections of the lands of the United States. Said grants of lands shall inure to the use and benefit of the Portage Lake and Lake Superior Ship Canal Company, *in accordance with an act of the Legislature of the State of Michigan conferring the land granted to the said State by the act herein referred to, on said company:* And provided further, That the time allowed for the completion of said work and the right of reversion to the United States, under the said act of Congress, approved March the third, 1865, be extended three additional years; And provided further, That no lands designated by the United States as "mineral" before the passage of this act shall be included within this grant.

How to be selected.

To whose use to inure.

Time for completing work extended 1865, Ch. 102, Sec. 5, Vol. XIII., p. 520.

Mineral lands not granted.

THESE GRANTS ARE ACCEPTED BY THE STATE OF MICHIGAN FOR CANAL PURPOSES BY THE ACTS OF MARCH 18, 1865, AND MARCH 27, 1867, AS FOLLOWS: LAWS OF MICHIGAN, 1865, ACT NO. 216, P. 474.

An Act to accept a grant of land by act of Congress, to aid in the construction of the ship canal and harbor at the head of Portage Lake, to connect with Lake Superior, and to provide for the construction of the same.

Section 1. The People of the State of Michigan enact, That the lands, franchises, rights, powers and privileges granted to and conferred upon the State of Michigan, by an act of Congress granting lands to aid in the construction of a ship canal and harbor from Portage Lake to Lake Superior, be and the same are hereby accepted, *with the restrictions and upon the terms and conditions contained in said Act of Congress.* Grant accepted.

Sec. 2. For the purpose of carrying out the objects of said act, the said lands are hereby granted and conferred upon the Portage Lake and Lake Superior Ship Canal Company, (a company organized under and by virtue of the laws of this State) subject to all the conditions, restrictions and obligations herein mentioned: And provided, That none of said lands shall be actually sold or otherwise disposed of, except for the purposes of hypothecation, until said canal and harbor shall be completed and accepted as hereinafter specified. Grant conferred. Proviso.

Sec. 3. It shall be the duty of the Governor of this State to appoint an engineer, at such salary as he may determine, not exceeding two thousand and five hundred dollars a year, to be paid as hereinafter provided; the said engineer shall proceed to survey, lay out and establish the route of said canal, and determine the termini thereof, and also prepare a plan for the construction of said canal and harbor in conformity with the provisions of the said act of Congress, and make a specification and diagram thereof, to be approved by the Governor, and when approved by him, the same shall be filed in the office of the Secretary of State, and a certified copy thereof, under the seal of the State, shall be filed in the office of the register of deeds, in and for the County of Houghton, and another copy thereof, certified under the said seal, shall be delivered to the said company; Provided, That said engineer may be removed and another one appointed, and so on from time Engineer. Compensation of. Duties. Removal.

to time whenever the Governor may deem it best for the interest of the State.

Construction of canal and harbor.

Sec. 4. It shall be the duty of said company forthwith, after having received said certified copy of the plan and specification of said canal and harbor, to proceed and construct the same in conformity therewith; and when the said company shall have completed the said canal in pursuance of the act of Congress and in conformity with the said plan and specification, it shall be the duty of the said engineer to certify the same to the Governor, whereupon it shall be the duty of the Governor to inspect the said work in person, or to appoint one or more agents to inspect the same, and determine whether the said canal or harbor are constructed as required by this act. And whenever the Governor shall determine that the said canal and harbor have been constructed by the said company, and in conformity with the said plan and specification, he shall certify the same to said company, and deposit a copy thereof in the office of the Secretary of State, and another copy thereof in the said office of the register of deeds in and for the said county of Houghton, and which certificate, as well as any certified copy thereof under the seal of the State, or made by said register, shall be evidence of the facts therein set forth; and when the Governor shall make such certificate and deliver the same to said company, the said company shall stand seized and possessed of the said lands as fully as the State can convey the same, and free of any tax for the term of four years, if so long held by said company; and the said company may, after having received such certificate, sell and dispose of said lands as the absolute owner thereof.

Completion to be certified to Governor.

Governor to give certificate of completion.

Company to be possessed of the grant.

Company to pay all expenses.

Sec. 5. All expenses incurred under and by virtue of this act shall be paid by the company, and the State shall not in any wise be holden therefor.

State may regulate tolls.

Sec. 6. The State shall at all times have the right to regulate and determine the tolls to be received by said company for the use of said canal and harbor, and also to cause the same, so far as necessary, to be applied to the improvement and preservation of the same, and in such manner as it may prescribe.

Sec. 7. This act shall take immediate effect.

AN ACT FOR THE ACCEPTANCE OF THE DONATION OF PUBLIC LANDS, MADE BY ACT OF CONGRESS, APPROVED JULY 3, 1866, TO THE STATE OF MICHIGAN, TO AID IN THE CONSTRUCTION OF A HARBOR AND SHIP CANAL AT PORTAGE LAKE, KEWEENAW POINT, LAKE SUPERIOR. LAWS OF MICHIGAN, 1867, VOL. 2, P. 960.

Section 1. The People of the State of Michigan enact, That the grant of land accruing to the State of Michigan, under and by virtue of an act of Congress, approved July third, 1866, to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, be and the same is hereby accepted, *in accordance with all the conditions and provisions in said act contained:* Provided, None of said lands shall be located in the County of Ontonagon until the completion of the said harbor and ship canal.

Sec. 2. This act shall take immediate effect.

Approved March 27th, 1867.

STATEMENT OF THE CASE.

Setting aside for consideration in another place the contention as to the proper construction of the forfeiture act of March 2, 1889, there is no phase of the controversy here that is not concluded by the authoritative judgments, in other cases, of this Court, and also of the Supreme Court of the State of Michigan.

The difficulty has been from the beginning to the end of this history, in the Land Office and in the courts, in pursuing the true issues in the case, that the confusion arisng from many legislative acts, changes of routes, changes in railroad companies, and releases of land grants affecting *other* grants and companies than the Ontonagon and State Line grant and the Ontonagon

and State Line Railroad Company, has sometimes misled.

When the history is mastered and understood, these propositions will conclusively appear:

(One) By the act of Congress of June 3, 1856, there was granted *in presenti* to the State of Michigan, to build a line of railroad from Ontonagon to the Wisconsin State line, "Every alternate section of land designated by odd "numbers for six sections in width on each side of that "line."*

(Two) This grant was conferred upon the Ontonagon and State Line railroad Company, which was organized to build that line and no other.

(Three) Not an acre of the grant was earned, and consequently, under the terms of the granting acts, neither the company nor its successors ever acquired the power to dispose of an acre of it.

(Four) Until the forfeiture act of Congress of March 2, 1889, this grant was never resumed or attempted to be resumed by the United States or by the State of Michigan, and was never forfeited or attempted to be forfeited or transferred to any other person or corporation by any act or assent of the Federal or State governments.

(Five) Neither the company nor any of its successors ever executed a release of the land granted for the purpose of building the Ontonagon and State Line road, or any part of it, and the State of Michigan never released the grant, or any part of it, to the general government. No such release was ever authorized or called for by any act or joint resolution of the Congress or of the State Legislature.

(Six) In these conditions, the Canal Company, under its grant from Congress of July 3, 1866, selected and

*The granting act of June 3, 1856, does not contemplate intersections with other roads, and in terms is a grant *in presenti* to the State of the same quantity of land throughout the entire line from Ontonagon to the Wisconsin State line.

caused to be certified to it the small portion that is here in controversy of the Ontonagon and State Line lands, which were not at the time of such selection and certificate "Public Lands of the United States," and were not "lands subject to private entry," to which the Canal Company grants were in terms restricted.

We demonstrate these propositions by a careful resume of the legislative and departmental history of the matter.

The act of June 3, 1856, by the usual words of grant *in presenti*, granted to the State of Michigan lands for two distinct lines of roads among others, i. e., one from Marquette to the Wisconsin State line, and the other from Ontonagon to the Wisconsin state line.

All of the maps filed are not here, but their contents are sufficiently identified by the evidence; but by the second map in the record, or by any map, it can be seen that the routes from Ontonagon and from Marquette to the Wisconsin State line were necessarily to be distinct and separate lines. Ontonagon could not be on the route from Marquette to the Wisconsin State line, and Marquette could not be on such a route from Ontonagon; and, indeed, as we have seen, and shall further see, they were finally laid out so as not to intersect at any point.

From the outset to the end this distinction between the Marquette and Ontonagon routes is kept up in the grants, in the selections, in all legislative action, and in the formation of corporations to accept the grants, as clearly as it is preserved between every one of these Upper

Peninsula routes and those provided for in the Lower Peninsula.

Section 3 of the act of 1856 (supra, page 11) declares the trust on which the State shall hold the legal title, as follows: "That the lands hereby granted the said "State shall be subject to the disposal of the Legislature "thereof, for the purposes aforesaid, and no other."

Section 4 provided: "That the lands hereby granted "to said State shall be disposed of by said State only in "the manner following, that is to say: That the granted "lands not exceeding one hundred and twenty sections "for each twenty miles complete of said roads may be "sold." And so on, permitting the sale for every twenty continuous miles of road built, and close as follows: "And so on, from time to time, until such roads are com- "pleted, and if any of said roads are not completed within "ten years, no further sales shall be made, and the lands "unsold shall revert to the United States."

The Ontonagon and State Line Railroad Company organized August 20, 1856.

The Marquette and State Line Railroad Company organized January 16, 1857.

Michigan, by the act of February 14, 1857 (supra, page 12), accepted the grant, "with the restrictions and upon "the terms and conditions contained in said act of Con- "gress," and conferred "so much of the aforesaid lands," etc., "as are or may be granted and conferred" upon different companies which had been formed for the different routes specified in the act of Congress, naming said companies and routes, and among others the *Marquette and State Line Railroad Company*, for the road from Marquette to the Wisconsin State line, and the *Ontonagon and State Line Railroad Company* for the route from Ontonagon to the Wisconsin State line.

Section 3 of the act provides that the lands, etc.,

"hereby conferred upon or vested in said railroad com-
"panies, or either of them, *shall be exclusively applied in*
"*the construction of their respective lines of railroad, as*
"*above designated, and said lands shall be applied to no*
"*other purposes whatsoever.*"

On March 27, 1857, the Ontonagon & State Line Railroad Company assumed to consolidate with the Chicago, St. Paul & Fond du Lac Railroad Company—an Illinois and Wisconsin corporation which had previously consolidated with the Marquette & State Line Railroad Company, and by the agreement of consolidation assumed to convey to the consolidated road, the Chicago, St. Paul & Fond du Lac Railroad Company, all its franchises, road-beds, etc., etc., and especially "all property, etc., acquired or to be "acquired by the party of the second part (O. & S. L. Co.) "from, of and under an act of Congress, to the lands "along the line of the road of said second party hereto." (Record, p. 128, folio 223; *Ib.*, p. 123, fol. 214). Not a rod of road had been built.

On December 3, 1857, the Commissioner of the General Land Office accepted the map of the line of the route from *Ontonagon* to the State line, but *declined* at that time to accept the map of the line of the route from *Marquette* to the State line (Rec., p. 104, fol. 182).

The Secretary of the Interior accepted the *Ontonagon* route April 7, 1858. (Rec., p. 105, fol. 183, bottom.)

Having gone through the form of consolidation with the Chicago, St. Paul & Fond du Lac Railroad Company, as we have seen, on March 27, 1857, ten days later, to wit, on April 5, 1857 (Rec., p. 49, fol. 259), the consolidated concern assumed to give a mortgage upon the then unearned lands of the Marquette and State Line and Ontonagon and State Line grants.

Under this mortgage the form of a foreclosure was gone through at the City of Janesville, in the State of

Wisconsin, on June 2, 1859, and a sale made to Samuel J. Tilden and others (Rec., p. 150, fol. 260); whereupon, on July 1, 1859, Samuel J. Tilden and others conveyed what they got by the sale to the Chicago & Northwestern Railway Company, a new corporation just formed in Wisconsin and Illinois, but not in Michigan. (*Ib. et seq.*)

Not a thing had been done toward building the Ontonagon & State Line road up to this point, and whether or not any legal rights could pass by mortgage or foreclosure, certain it is that from the beginning to the end of the matter, as we shall see, the *Chicago & Northwestern Railway Company never claimed or pretended to have any right to the land grant made to build the Ontonagon Road.*

On December 10, 1861 (Rec., p. 106, fol. 185), the Commissioner of the Land Office separately certified to the State a list of the lands granted to aid in the construction of the road from Marquette to the Wisconsin State line. On December 12, 1861, without any recognition of the said foreclosure, he certified a distinct and separate other list of 142,430.32 acres (embracing the lands in controversy), as the lands covering the grant to aid in the construction of the road from *Ontonagon* to the Wisconsin State line (Rec., p. 107, fol. 187), keeping the lands assigned for building the independent line from Ontonagon to the State line by themselves.

On December 12, 1861, he certified in distinct lists those lands to go to the Marquette line and to the Ontonagon line, *where they intersect* (Rec., p. 108, fol. 189).

Nothing having been done in the way of building the roads on either the Marquette and State line route, or the *Ontonagon* and State line route, the Michigan Legislature, by act approved March 4th, 1861 (supra, p. .), recited the consolidation of the *Marquette State Line Company* with the Chicago, St. Paul & Fond du Lac Company, recited the insolvency of the consolidated com-

pany, and the fact that all the latter's property in Wisconsin has been transferred to another company, and provides that the lands, etc., granted by the act of Congress of June 3d, 1856, for the road from *Marquette to the Wisconsin State line*, may be transferred by the board of control of the State of Michigan to some other company, and provides for a change in the terminus of that road at the Wisconsin State line. *There is no reference to the grant for the Ontonagon & State Line road, nor is there any recognition of any title in the Chicago & Northwestern through any foreclosure or otherwise, and the act is expressly confined in its objects to the distinct grant for the Marquette & State Line road.*

On March 1st, 1862, the Peninsula Railroad Company presented its petition to the board of control, setting up that it had been organized for the construction of the railroad *from Marquette to the Wisconsin State line* under the proposed change of route, under said act of March 4, 1861, and asked for the transfer of the rights, lands and privileges theretofore accorded to the *Marquette and State Line Railroad Company.* The Peninsula Company did not claim to have succeeded to or to have been formed for the building of the *Ontonagon* & State Line Road, or for the acquisition of its grant (Rec., p. 134).

The Chicago & Northwestern Railway Company at the same time filed its statement with the board of control, that "it is the legal and residuary representative and holder" of the rights and franchises of the Chicago, St. Paul & Fond du Lac Railroad Company, who are "referred to in act No. 90, approved March 4th, 1861," *i. e.*, the Marquette and State Line road. It claims nothing on account of the *Ontonagon* and State Line road or grant, but requests the confirmation of the grant of lands "referred to in Section 1" (the Marquette and State Line grant) upon the Peninsula Company (Rec., p. 135).

The board of control considered the application with full recitals, confining their action and their transfer distinctly to the *Marquette & State Line road*, and conferred that *grant upon* the Peninsula company *with the change of route* (Rec., pp. 136-7).

By the joint resolution of Congress, approved July 5th, 1862, it is provided that "The location of the line of railroad provided for in said act (original grant of June 3d, 1856) *from Marquette to the Wisconsin State line*," may be changed to a point on the Wisconsin State line near the mouth of the Menominee river.

The joint resolution further provides as to the lists of the railroad lands already filed according to the former route of the Marquette & State Line Railroad Company, "as now selected and certified in the General Land Office" "that the Governor certify under the seal of the State, that the said State and its assigns surrender all claim to the lands as aforesaid set forth and described in the list thereof thus certified,(and that the same have never been pledged or sold or in any wise incumbered," and that then the State may receive a like quantity of land selected in like manner upon the new line of road "as thus surrendered upon the first line."

The last paragraph of the joint resolution is as follows: "And it shall be the duty of the Commissioner of the General Land Office to re-offer for public sale in the usual manner the lands embraced in the lists of surrendered lands aforesaid when duly filed in the office as herein directed."

The Legislature of Michigan, by act approved March 18th, 1863, confirmed the action of the board of control conferring the grant to build the line under the act of March 4th, 1861, upon the Peninsula Railroad Company.

On May 6th, 1863, the Peninsula Railroad Company filed its formal release to the United States of the lands

located on the original line from *Marquette to the State line*, distinctly and specifically describing the lands and none other (Rec., p. 148).

On October 21st, 1864, the Chicago & Northwestern and the Peninsula Company of Michigan consolidated (Rec., p. 138, fol. 240).

By joint resolution approved February 21st, 1867, the State authorized the Governor to execute and file the certificate of surrender required by said joint resolution of Congress, and distinctly recited by description the grant of land to be surrendered as that one for the construction of the road from Marquette to the Wisconsin State line (*Supra*, p. 21).

On January 31st, 1868, the Chicago & Northwestern Railroad, in a formal release, recited the foregoing history of the change of route of the Marquette & State Line Road, and released by description the lands along that original route (Rec., p. 151, bottom). Thereupon, on May 1st, 1868, the Governor recites the joint resolution of Congress, his authority by the joint resolution of the Legislature, the history of the change of route, and distinctly releases the lands along the original line of the Marquette State Line Road, and none other save where the old lines intersect.

Up to this point no one had ever confused the two distinct roads and two distinct land grants, *i. e.*, the Marquette & State Line and the Ontonagon & State Line, and there never had been a claim that they were dependent, or that the Ontonagon & State Line road cut any figure in any of the transactions, for the simple reason, apparently, that nothing had ever been done upon the line, and no corporation claimed title to any of the lands.

In the language of the grant of 1856, and of the State's declaration of trust in accepting it in 1857, the title was held by the State to aid in the construction of a railroad

from Ontonagon to the Wisconsin State line, and "for no other purpose," or, failing, that the trust undoubtedly was to return it to the grantor, which could be done as stated by this court in *Schulenberg vs. Harriman, in 21 Wall., p. 44*, construing the same grant of 1856, after "holding it for the grantor until there should be some legislative assertion of ownership of the property."

In these conditions the then commissioner of the land office, we will say on a superficial examination, and evidently believing that Ontonagon was on the route from the Wisconsin State line to Marquette, and that there was but one route, July 13, 1868, writes to the solicitor of the Chicago & Northwestern Company, the consolidated company who had undertaken to build the changed line from Marquette to Menominee, that the release of the Governor as descriptive of the tracts "for that portion of the branch line from the Wisconsin State line to Marquette is in conformity with joint resolution of July 5th, 1862." He calls attention to a list of lands embracing 142,430.32 acres (the *Ontonagon* lands) certified to the State December 12th, 1861, as omitted, and says: "The State and railroad company are requested to execute a similar release for said land (Rec., p. 156, fol. 271).

The Chicago & Northwestern Company had no list of these lands, and never had made a claim to them up to April 19, 1870 (p. 157).

And the list was forwarded by the commissioner himself April 5, 1870 (p. 157).

Neither the land office or the State of Michigan adhered to this mistake of the commisioner. The commissioner states in his letter to the secretary of the interior, that his predecessor "erred in demanding deeds of relinquishment of the lands granted for the Ontonagon & State Line Railroad Company." (Rec., p. 114.) He further says: "There does not appear to have been any action taken either by

the board of control or State Legislature to transfer the grant originally made to the Ontonagon & State Line Railroad, or to the said Chicago & Northwestern Railroad Company, or authorizing the Governor of Michigan to make such a deed, and the title to said land appears to be in the State of Michigan under the original grant by act of June 3, 1856, and the subsequent approval made thereunder" (Rec., pp. 111, 114).

Governor Bagley, of Michigan, on July 10, 1873, says: "My predecessor, Governor Baldwin, in 1868 (?) surrendered these lands, contrary, in his opinion, to law, in deference to the demand of the commissioner of the general land office" (p. 132, f. 231).

Commissioner Williamson states that these lands were included through inadvertence (Rec., p. 120, f. 209).

The secretary of the interior, Mr. Schurz, transmits with his approval to the house committee on public lands the commissioner's opinion in the words following:

"It appears that the action of my predecessor in demanding and accepting, as well as that of the railroad company and the Governor in executing deeds of relinquishment of land, being the land in question, was unauthorized, and that the title thereto remains in the State, there having been no declaration of forfeiture" (Rec., pp. 118, 122).

The Senate committee on public lands review the whole subject with the same conclusion (Rec., pp. 128, 131).

But at the request of the railroad companies, in 1870, to satisfy the commissioner, the Governor and the Chicago & Northwestern road did execute releases *in form precisely like the former ones* (Rec., pp. 158-161), *and although lists of the lands in question are attached, furnished for the purpose, as we have seen, yet the releases and their recitals emphatically confine their effect to the grant on the original line from Marquette to the State line.*

The recitals refer to "*The list of said railroad lands*

granted by said Act of 1856, *to aid in the construction of said railroad from Marquette to the Wisconsin State line, as the same was originally located, filed in the general land office,*" and limit the description by naming them as the lands granted to the Peninsular road.

As stated by Commissioner Williamson in discussing this last stated release, "The recital in said deed does not set up title in the Chicago & Northwestern Railroad Company in and to the lands thereby relinquished, neither does it show authority on the part of the Governor of Michigan to make a valid deed of relinquishment of said lands on behalf of the State of Michigan, said recital being the same as the recitals in the deed of relinquishment made May 1st, 1868, by the said railroad company and the Governor, of the lands originally granted on the line of the Marquette to the Wisconsin State line, which lands, as stated above, have been duly conferred upon the Peninsula Company by action of the board of control, duly had and subsequently confirmed by act of the Legislature of the State of Michigan" (Rec., p. 113, fol. 197).

The opinion of Michigan's attorney-general, so frequently cited as advising the last release of the land in question, does not so advise (Rec., p. 160).

He advises the governor as follows: "*Of course, I know nothing about the description of the lands given, but presume they are correct.* * * * *If any of them should prove incorrect I don't see how it could affect the State. In such case your certificate would be a simple nullity as being unauthorized by law.*" Again, he says that "The release will only 'release' the interest of the State to such lands as are contemplated by acts of Congress approved June 3d, 1856, July 5th, 1862, and March 3d, 1865." (Letter of July 29th, 1870.)

The description of lands in the act of July 5th, 1862, is confined to the land originally granted for the Marquette and State Line road.

THE CANAL COMPANY HISTORY.

The canal history begins at a time when the lands in question were not a part of the public domain of the United States. The title was in the State under a clearly defined trust for other purposes. It had not been divested by any forfeiture asserted, "Either through judicial pro-"ceedings instituted under authority of law for that pur-"pose or through some legislative action equivalent to a "judgment of office found at common law, * * * "direct, positive and free from all doubt or ambiguity" (St. Louis R. R. vs. McGee, 115 U. S., p. 473).

By act of Congress approved March 3, 1865, there was made the first grant to the State of Michigan of 200,000 acres of land, to be selected "by an agent appointed by the Governor of the State," from any lands in the Upper Peninsula "*subject to private entry.*" to aid in the construction of a canal to connect the waters of Lake Superior with the waters of Portage Lake. There was no claim made under this grant for any of the lands in controversy, and it is only referred to, as in our view the succeeding act must be construed in *pari materia* with it.

By an act of Congress approved July 3, 1866, Congress granted to the State, "In addition to a former grant, approved March 3, 1865," two hundred thousand acres more in the Upper Peninsula, "*of the lands of the United States.*"

Both grants contained the words of grant *in presenti*, to wit, "There be and is hereby granted," and, under an unbroken line of authorities, passed *then* to the State, for the purposes of the act, clear title to the lands named, and, of course, to only such as were then lands of the United States; and the certification and action of the land department do not aid the title so passed at the date of the act,

and these formalities might be dispensed with. They can not aid or enlarge the grant, or pass anything, as of a time, after the original conferring act.

Wright vs. Roseberry, 121 U. S., at p. 490 and authorities *infra*.

The grant of 1865—first grant—was accepted by the State "with the restriction, and upon the terms and conditions contained in said act of Congress," and was conferred upon the canal company.

The grant of 1866 provided that it should "inure to the "use and benefit of the canal company, in accordance with "the act of the Legislature of Michigan, conferring the land "granted to the State" in 1865.

The Michigan Legislature briefly accepted the second grant "In accordance with all the conditions in said act contained," March 27, 1867.

By the letters of the commissioner of the land office, of March 27, and November 27, 1867, and other letters, it is seen that that office was urging the canal company to make its selections under the grant of 1866, about which that company seems to have been dilatory.

The agent nominated by the Governor of Michigan, under authority of the acts of Congress, to select lands under these grants, was Hon. P. J. Avery, the *President of the Canal Company* and he selected these lands. (Rec. p. 104, fol. 181; p. 179, bottom).

On June 15th, 1868, Mr. Avery, acting as agent, had selected 50,072.57 *acres of the land originally belonging to the railroad route, from Marquette to the State line, but duly surrendered to the general government under the joint resolutions of Congress and of the State by the duly authorized act of the Governor.* (Rec., p. 121, fol. 211).

This agent and president of the Canal Company also attempted the selection of lands in the original grant for the

Ontonagon and State Line road, but had express notice in writing from the commissioner, October 6th, 1869, that these lands were not in the Marquette grant, had not been released, and required before they could be certified to the Canal Company "a release from the State authorities" (Id.)

The commissioner also sent TO AVERY a form of release (*Id.*) and thus is explained the movement for the illegal releases of 1870.

The canal company after this and on May 19, 1871, risked the selection of but 15,000 acres of the Ontonagon & State Line grant, and their certification followed three days later (Rec., p. 118, folio 206; p. 121, fol. 211).

Even if it were a private individual, and not a sovereignty, against whom the doctrine of estoppel is urged by counsel for the Canal Company, it would seem that this bit of evidence might render his authorities inapt!

The circumstantial evidence tends to show, and a jury would probably infer, that the movement for the second set of illegal releases was initiated by the Canal Company itself, to secure for itself certain valuable pine and mineral lands on this grant. At all events, this evidence shows that the illegal conveyance or certificate to the Canal Company was received by it with full notice of its illegality, before conveyance or certificate, when it had abundant opportunity, time and property offered to legally fill its demand. The company had full notice from the Land Office that it could not select these lands because they had not been released from the railroad grant.

Unless it be true that notice to the Canal Company that a release from the State was required, was not sufficient to put it upon inquiry, without supplementing it with an authoritative judgment or reliable opinion as to what would constitute a valid release, then the notice

was enough, we submit, to eliminate from this case any suggestion of the doctrine of estoppel.

If the Canal Company, without fault, in good faith and without notice, has taken these fifteen thousand acres with this defective title, it has its claim (preserved by the act of March 2, 1889) on the Federal Government for indemnity. When that question comes up, its good faith in taking these lands and its clean hands towards the Government will be also an issue. Judicial notice may be taken of its relation to the Government in this regard in every one of the many proceedings, direct and indirect, it has taken to secure confirmation of this title at the hands of Congress and of the State Legislature, and of the figure it cuts in its relations to this grant and the settlers upon it. (See Report No. 684, 1st Session, 48th Congress, page 10; Report No. 2631, 2nd Session, 48th Congress; Report No. 1463 of the Committee on Banking and Currency, 46th Congress, 2nd Session.)

The evidence in the case of the manner in which the present company acquired the grant through the foreclosure of the mortgage made by the old company, and the references to it and its members in these reports of Congress and in the history of litigations in this Court, does not help the case or add to the equities of the new company. Quite the contrary.

There are no moral or legal equities to be urged in behalf of the original bondholders. They were long ago foreclosed and their interests wiped out; or in behalf of purchasers of land from the Canal Company. That company has held on to its lands. And certainly not in behalf of the persons forming the new Canal Company, who are identified with its history from the time that history became public.

The selection was absolutely void, as we shall see, upon another ground; it was made by the president, Mr. Avery,

under a commission issued by the Governor of Michigan *expressly pointing out to him that he could not select from these lands.* They were not subject to private entry.

Ex. Act No. 83, 1867.

State of Michigan,
Executive Office,
Flint, Oct. 4, 1867.

Hon. O. L. Spaulding,
Secretary of State:

Sir—Let a commission to P. J. Avery, of Marquette, Mich., to be an agent to select two hundred thousand acres of public lands, in subdivisions, agreeably to the United States survey, from any lands in the Upper Peninsula of this State, *subject to private entry*, in conformity with the provisions and under the restrictions of an act of Congress entitled "An Act granting lands to the State of Michigan, to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," approved July 3, 1866. S'd: Henry H. Crapo, *Governor.* (Rec., p. 104.)

Notwithstanding the requirement of the granting act; notwithstanding the requirement of the first resolution of Congress of July 5, 1862, that all railroad lands released by the State should be offered at public sale, and notwithstanding the above express direction of the Governor, the lands selected and certified to the Canal Company on May 22, 1871, had not been offered at public sale, and were not therefore lands "subject to private entry."

The rubbish has been cleared away from the real questions presented here by the patient examination of the

facts made by the learned justices of this Court, who delivered at Circuit the opinions on the motion for new trial printed in this record, and on the law of the case, very little can be added to the exhaustive analysis of the principles involved, and of the authorities presented in those opinions; but we may possibly aid the Court by a somewhat fuller review of the authorities bearing upon the distinct propositions we have made.

And First:

THE LANDS ORIGINALLY GRANTED BY CONGRESS FOR RAILROAD PURPOSES COULD NOT PASS TO THE CANAL COMPANY BY THE CANAL GRANT, OR BY ANY ACT OF THE LAND OFFICE OR BY THE ACT OF THE STATE OF MICHIGAN.

The canal grants of 1865 and 1866, and the railroad grant of 1856, all passed title to the State of Michigan *in presenti.*

The railroad grant passed a legal title to the State, which remained legally undisturbed at the date of the canal grants.

There has been no change in the law, or departure from the uniformity of authority upon the question since the judgment in the case of *Wilcox vs. Jackson*, 13 Pet., 498, holding that "Whensoever a tract of land shall have once "been legally appropriated to any purpose, from that mo- "ment the land thus appropriated becomes severed from "the mass of public lands; and that *no subsequent law*, or "proclamation, or sale, would be construed to embrace it, "or to operate upon it, although no reservation were made "of it."

Newhall vs. Sanger, 92 U. S., 761. The Court says:

"The subject of grants of land to aid in the construction of works of internal improvement was fully considered at

the present term in *Leavenworth, Lawrence & Galveston Railway Company vs. United States, supra*, p. 733. We held that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves, and we confine the grants of every alternate section of land to such whereto the complete title was absolutely vested in the United States. The acts which govern this case are more explicit, and leave less room for construction. The words 'public lands' are habitually used in legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could the order withdrawing lands from pre-emption, private entry and sale apply.

"In the case of *Leavenworth, Lawrence & Galveston Railway Company vs. United States*, 92 U. S, 733, the doctrine of *Wilcox vs. Jackson*, 13 Pet., 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it, is reaffirmed; and holds also that where Congress enacts "That there be and is hereby granted to a State to aid in the construction of a specified railroad 'every alternate section of land designated by odd numbers' within certain limitations on each side of said road, the State takes an immediate interest in lands so situate, whereto the complete title is in the United States at the date of the act, although the survey of the land and a location of the road are necessary to give precision to the title and attach it to any particular tract. * * * * *

"* * * The main question in the *Dubuque & Pacific Railroad Company vs. Litchfield*, 23 How., 66, was whether a grant to the Territory of Iowa, to aid in the improvement of the navigation of the Des Moines river, extended to the lands above the Raccoon Fork, or was confined to those below it. The Court in deciding it say: 'All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed absolutely in clear and explicit language; as the rights here claimed are derived entirely from the act of Congress, the donations stand on the same footing as a grant by the public to a private company, the terms of which must be plainly expressed in the statutes, and if not thus expressed they cannot be implied.' This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and it does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction.

"It (the grant) *creates an immediate interest* AND DOES "NOT INDICATE A PURPOSE TO GIVE IN THE FUTURE. 'There "be and is hereby granted' are words of absolute donation, "and import a grant *in presenti*. This court has held that "they can have no other meaning, and the land department "in this interpretation has uniformly administered every "previous grant."

The learned justice cites: *Railroad Company vs. Smith*, 9 Wall., 95; *Schulenberg vs. Harriman*, 21 Wall., 60; 1 Lest., 513; 8th Opinions, 257; 11 *id.*, 47, and says further: "They vest a present title in the State of Kansas, though a "survey of the land and the location of the road are neces- "sary to give precision to it, and attach it to any particular "tract. The grant then becomes certain, and by relation "has the same effect upon the selected parcels as if it had "specifically described them. In other words, the grant

"was afloat until the route should be definitely fixed. But "did Congress intend that it should reach these lands? Its "general terms neither include nor exclude them. Every "alternate section, designated by odd numbers, within cer- "tain defined limits, is granted; but only the public lands "owned absolutely by the United States, are subject by "survey and division into sections, and to them alone this "grant is applicable. * * * * * * Since the "land system was inaugurated it has been the settled "policy of the government to sell lands to individuals, and "for the last twenty-five years to grant them to States "in large tracts, to aid in works of internal improvement. "*But these grants have already been recognized as at-* "*taching only to so much of the public domain as was* "*subject to sale or other disposal*, though the roads of "many subsidized companies passed through Indian res- "ervations. *Such grants could not be otherwise construed,* "*for Congress cannot be supposed to have thereby intend-* "*ed to include lands previously appropriated to any other* "*purpose, unless there be an express declaration to that* "*effect. A special exception of it was not necessary, be-* "*cause the policy which dictated them confined them to* "*land which Congress could rightfully bestow, without* "*disturbing existing relations and provoking vexatious* "*conflicts. The legislation which reserved it for any pur-* "*pose excluded it from disposal as public lands as public* "*lands are usually disposed of.*"

The court quotes the principle laid down in 13 Peters, *supra*, and says: "The principle asserted is sound and reasonable, and we accept it as a rule of construction. The Supreme Courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. (*State vs. Delesdeiner*, 7 Tex., 76; *Spaulding vs. Martin*, 11 Wis., 274).

And on p. 747, "Every tract set apart for special uses is reserved to the government, to enable it to enforce them.

There is no difference in this respect whether it be appropriated for Indians or for other purposes. There is an equal obligation resting upon the government to require that neither classes of reservation be diverted from the uses to which it is assigned."

In *Eldred vs. Sexton*, 19 Wall., 189, Mr. Justice Davis distinctly lays down the rule, and applies it *to this railroad grant*, that "legislation was necessary to take these lands, "after the change of route, out of the railroad grant, and "restore them to the general body of unsold land * * * "as was done by the joint resolution of April 25, 1862."

Johnson vs. Ballou, 28 Mich., p. 379. In this judgment Judge Cooley considers the railroad grant here in question, reviews the authorities and lays down the same doctrine, and holding that the title is in the State and remains there till the conditions of the original grant of Congress are complied with.

Davison vs. J., L. & S. R. R., 32 N. W. R., p. 733 (Mich. Sup. Court).

And see

Glasgow vs. Baker, 128 U. S., 560.
U. S. vs. McLaughlin, 128 U. S., 456.
Parker vs. Ladeaux, 129 U. S., 346.
Davis' Administrator vs. Weibold, 139 U. S., 507, 529.

THE TITLE TO THE RAILROAD LANDS WAS IN THE STATE, AND IT COULD PASS NO TITLE SAVE IN ACCORDANCE WITH ITS TRUST. IT FOLLOWS THAT BEFORE THE EARNING OF AN ACRE OF LAND BY THE CONSTRUCTION OF THE ROAD AS PROVIDED BY THE GRANT, NO GRANTEE OF THE STATE COULD PASS TITLE BY MORTGAGE OR FORECLOSURE.

By the same Act of Congress, approved June 3, 1856, a grant was made to the State of Wisconsin for railroad purposes, on the same terms and conditions as in the grant to Michigan.

Wisconsin "conferred" the grant on a railroad company which, as in this case, failed to build the road until the period within which it was to be completed by the terms of the grant had expired, as in this case.

In *Schulenburg vs. Harriman*, 21 Wall., 44, the Supreme Court construe the grant and its effect in these conditions, Mr. Justice Field delivering the opinion. He says:

"The position that if the acts of Congress vested in the "State a title to the lands designated, that title was trans- "ferred by the act of its Legislature, passed March 10th, "1869 (the act of the State conferring the lands on the R. "R. Co.), is equally untenable. The State, by the terms of "the grants from Congress, possessed no authority to dis- "pose of the lands beyond one hundred and twenty sections, "except as the road, in aid of which the grants were made, "was constructed. The company named in the act never "constructed any portion of such road, and there is no evi- "dence that the State ever exercised the power to sell the "one hundred and twenty sections authorized in advance "of such construction. The acts of Congress made it a "condition precedent to the conveyance by the State of any "other lands, that the road should be constructed in sec- "tions of not less than twenty consecutive miles each. No "conveyance in violation of the terms of those acts, the "road not having been constructed, could pass any title to "the company.

"Besides, it is evident, notwithstanding the words of "transfer to the company contained in the first part of the "nineteenth section of the act of the State, that it was "not the intention of the State that the title should pass "except upon the construction of the road. Its concluding "language is that 'upon the construction and completion "of every twenty miles of said railway the said company "shall acquire a fee simple, absolute in and to all that

"portion of the land granted' to the State appertaining "to the portion of the railway so constructed and com- "pleted.

"We proceed, therefore, to the consideration of the sev- "eral grounds upon which the defendant justifies his seiz- "ure of the logs in controversy, and claim a return of them "to him.

"1. That the act of Congress of June 3d, 1856, "passed a present interest in the lands designated, "there can be no doubt. The language used imports "a present grant, and admits of no other meaning. "The language of the first section is, '*that there be*, "*and is hereby granted* to the State of Wisconsin' the "lands specified. The third section declares 'that the "said lands *hereby granted* to said State shall be subject "to *the disposal* of the Legislature thereof;' and the fourth "section provides in what manner sales shall be made, "and enacts that if the road be not completed within ten "years 'no further sales shall be made, and the lands "unsold shall *revert* to the United States.' The power of "disposal and the provision for the lands reverting both "imply what the first section in terms declares, that a "grant is made; that is, that the title is transferred to the "State. It is true that the route of the railroad, for the "construction of which the grant was made, was yet to "be designated, and until such designation the title did not "attach to any specific tracts of land. The title passed "to the sections, to be afterwards located; when the route "was fixed their location became certain, and the title, "which was previously imperfect, acquired precision and "became attached to the land."

After analyzing authorities, the learned judge proceeds as follows:

"The rules applicable to private transactions, which "regard grants of future application—of lands to be after-

"wards designated—as mere contracts to convey, and not "as actual conveyances, are founded upon the common "law, which requires the possibility of present identifica- "tion of property to the validity of its transfer. A legis- "lative grant operates as a law as well as a transfer of "the property, and has such force as the intent of the "Legislature requires.

"The case of *Rice vs. Railroad Company*, reported in "the first of Black, does not conflict with these views. The "words of the present grant in the first section of the act "there under consideration were restrained by a provision "in a subsequent section declaring that the title should "not vest in the Territory of Minnesota until the road or "portions of it were built.

"The granting of additional land by the first section of "the act of Congress of 1864 is similar in its language, "and is subject to the same terms and conditions as the "grant by the act of 1856. With the other grants, made "by the act of 1864, we are not concerned in the present "case.

"2. The provision in the act of Congress of 1856, that "all lands remaining unsold after ten years shall revert to "the United States, if the road be not then completed, is "no more than a provision that the grant shall be void if "a condition subsequent be not performed. In Sheppard's "Touchstone it is said: 'If the words in the close or con- "clusion of a condition be thus: that the land shall return "to the enfeoffer, etc., or that he shall take it again and "turn it to his own profit, or *that the land shall revert*, or "that the feoffer shall *recipere* the land, these are, either "of them, good words in a condition to give a re-entry— "as good as the word "re-enter"—and by these words the es- "tate will be made conditional.' The prohibition against "further sales, if the road be not completed within the

"period prescribed, adds nothing to the force of the pro-
"vision. A cessation of sales in that event is implied in
"the condition that the lands shall then revert; if the
"condition be not enforced, the power to sell continues
"as before its breach, limited only by the objects of the
"grant, and the manner of sale prescribed in the act.

"And it is settled law that no one can take advantage
"of the non-performance of a condition subsequent an-
"nexed to an estate in fee, but the grantor or his heirs,
"or the successors of the grantor, if the grant proceed
"from an artificial person; and if they do not see fit to
"assert their right to enforce a forfeiture on that ground,
"the title remains unimpaired in the grantee. The au-
"thorities on this point, with hardly an exception, are all
"one way, from the year books down. And the same
"doctrine obtains where the grant upon condition pre-
"cedes from the government; no individual can assail the
"title it has conveyed on the ground that the grantee has
"failed to perform the conditions annexed.

"In what manner the reserved rights of the grantor for
"breach of the condition must be asserted so as to restore
"the estate depends upon the character of the grant. If
"it be a private grant, that right must be asserted by
"entry or its equivalent. If the grant be a public one,
"it must be asserted by judicial proceedings authorized
"by law, the equivalent of an inquest of office at common
"law, finding the fact of forfeiture and adjudging the
"restoration of the estate on that ground, or there must
"be some legislative assertion of ownership of the property
"for breach of the condition, such as an act directing the
"possession and appropriation of the property, or that it
"be offered for sale or settlement. At common law the
"sovereign could not make an entry in person, and, there-
"fore, an office-found was necessary to determine the es-
"tate, but as said by this Court in a late case, 'the mode

"of asserting or resuming the forfeited grant is subject to "the legislative authority of the government. It may be "after judicial investigation, or by taking possession di- "rectly under the authority of the government without "these preliminary proceedings.' In the present case no "action has been taken either by legislation or judicial "proceedings to enforce a forfeiture of the estate granted "by the acts of 1856 and 1864. The title remains, there- "fore, in the State as completely as it existed on the day "when the title by location of the route of the railroad "acquired precision and became attached to the adjoining "alternate sections."

To the same effect and directly to the point that under this grant the State could pass no title to any land till the road was commenced, and then only according to the conditions of the grant, and that the grantee of the State in such case could make no valid encumbrance or conveyance, see the following decisions of the Michigan Supreme Court describing the grant in question:

Jackson, L. & S. Co. vs. Davison, 32 N. W. R., see p. 733 *et seq.* (Champlin, J.).
Johnson vs. Bollon, 28 Mich., 379 (Cooley, J.).
Rogers vs. Pt. Huron Co., 45 Mich., 461 (Campbell, J.).
Wolsey vs. Chapman, 101 U. S., 755.

The last case is now referred to for the purpose of showing that approval of selections of land not embraced in a particular grant of land are void, and convey no title, and also that where the State conveys to an individual, he takes no title if the State had none, and that no question of estoppel by warranty arises, and that title afterwards acquired by the State does not inure to the benefit of the State grantee.

This was a suit in equity brought by Chapman, who claimed under the river grant to the State for the

improvement of the Des Moines River to quiet his title as against Wolsey, whose rights depended on a patent from the State of Iowa, granting the lands in dispute as part of the lands ceded to Iowa under the eighth section of the act of Congress of September 4th, 1841, entitled, "An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights." At the time of the making of the grant of September 4th, 1841, Iowa was a territory. On the 17th of October, 1846, the Commissioner of the General Land Office requested the Governor of the territory to appoint an agent to select the land under the river grant, at the same time intimating that the grant only extended from the Missouri to the Raccoon Fork of the Des Moines River. On the 17th of December, a few days before the admission of the territory as a State, the territorial authorities designated the odd numbered sections as the lands selected under the grant by joint resolution, approved January 9th, 1847. Subsequently a dispute arose between the State and the Interior Department as to the extent of the grant, and the Secretary of the Interior declined to recognize the grant as extending as claimed by the State without an explanatory act of Congress, and advised delay that Congress might have an opportunity of acting upon the matter. The Secretary of the Interior, however, finally agreed to recognize the claim of the State for the purpose of enabling a judicial decision to be obtained in regard to it, and the selections made were approved by the Secretary of the Interior. After this, Wolsey bought the lands in question, which were within the disputed territory, from the State, and received the Commissioner's patent therefor. Following the contract of sale, on the 6th of January, 1854, but before the issue of the patent, the Commissioner of the General Land Office withdrew the approval of the selection. The executive department of the government

had determined that because of doubts about the extent and operations of the act, nothing could be done to impair the rights of the State above the Raccoon Fork until the differences were settled either by Congress or judicial decision. An order was accordingly issued, directing the land officers to withhold all the disputed lands from sale. The Court says, p. 770, after reciting the history of the case at length: "This being the case, under our former decisions no title passes to the State by the approval of the selection of the lands in dispute under the act of 1841. Being lawfully reserved from sale at the time of the selection, they were not included in the grant, which that act provided for."

As to the right of Chapman to question Wolsey's title, the Court says: "If this were entertained, no doubt if the State had no title when the patent issued to Wolsey, he took nothing by the grant. *No question of estoppel arises; neither does the after acquired title inure to the benefit of Wolsey, because, when the United States made the grant in 1861 it was for the benefit of bona fide purchasers from the State under the grant of 1846*" (not of 1841).

The gist of this portion of the case is, that Wolsey, having purchased from the State lands which had, by the authority of the United States, been withheld from the operations of the grant of 1841, until the limits of that grant could be properly determined, and his purchase having been made of lands which had been improperly certified to the State, while so withheld from sale, he acquired no title by reason of such unlawful certifying, while the legislation of 1861-2, by which the title to the disputed lands was conveyed to the State by Congress, was for the benefit of bona fide purchasers under the grant made by Congress in 1846, and which had also been improperly certified to the State. In 1 Perry on Trusts,

Sec. 41, it is stated that "The United States, and each one of the separate States, may sustain the character of trustee. They have legal capacities to take and execute trusts for every purpose." * * * "If a State accept a trust by grant or bequest, it must act through its legislative powers in administering the trust, or in creating and appointing agents or officers to perform the duties which it assumes; as the United States acted in relation to the bequest of James Smithson, in trust for the establishment of the Smithsonian Institution for the increase and diffusion of knowledge among men."

The case of the *St. Louis Co. vs. McGee*, 115 U. S., is not in point, for the simple reason that after the deed of the land to McGee by the railroad company, aided by the grant, another act, construed in *pari materia* with the original granting act, extended the time for building the road ten years, and it was then built. The Court says the "evident purpose of Congress was to waive a forfeiture "and extend the time for earning the lands under the "original grants."

THE CERTIFICATION OF THE LANDS IN QUESTION TO THE CANAL COMPANY BY THE LAND OFFICE WAS VOID, NOT MERELY VOIDABLE, AND THIS DEFENDANT CAN SET IT UP AS A DEFENSE IN THIS ACTION.

The distinctions are perfectly clear and settled by an unbroken line of authorities.

It is not a case where irregularities more or less gross and injurious to the citizens are alleged, and in which relief can only be had in a direct proceeding assailing a patent or a certification on such grounds. But it is a case setting up an entire want of jurisdiction in the federal officer to issue the patent or certification.

And this case radically differs from that of *Chandler vs. the Calumet & Hecla Company*, 36 F. R., 665, arising under the swamp land grant. By the latter grant the secretary of the interior is vested by the act with a *quasi judicial* function to determine what lands shall pass *in respect of their character* and his determination is the only criterion of ascertainment by the terms of the grant.

The distinctions are clearly laid down in the latter pages of the opinion in *Wright vs. Roseberry*, 121 U. S., 488, and with notable clearness in the case of *Doolans vs. Carr*, 125 U. S., 618, where the authorities are fully examined and analyzed, and where a patent of the United States was held void in an ejectment suit where a mere intruder set up the defense. We quote from the judgment delivered by Mr. Justice Miller:

"*There is no question as to the principle that where the "officers of the government have issued a patent in due "form of law, which on its face is sufficient to convey the "title to the land described in it, such patent is to be "treated as valid in actions at law, as distinguished from "suits in equity; subject, however, at all times, to the "inquiry whether such officers had the lawful authority to "make a conveyance of the title. But if those officers acted "without authority, if the land which they purported to "convey had never been within their control, or had "been withdrawn from that control at the time they "undertook to exercise such authority, then their act "was void—void for want of power in them to act on "the subject-matter of the patent, not merely voidable*; "in which case, if the circumstances justified such a de- "cree, a direct proceeding, with proper averments and "evidence, would be required to establish that it was void- "able, and should therefore be avoided. The distinction "is a manifest one, although the circumstances that enter "into it are not always easily defined. It is, nevertheless,

"a clear distinction, established by law, and it has been "often asserted in this court, that even a patent from "the government of the United States, issued with all the "forms of law, may be shown to be void by extrinsic evi- "dence, if it be such evidence as by its nature is capable "of showing a want of authority for its issue.

"The decisions of this court on this subject are so full "and decisive that a reference to a few of them is all "that is necessary: *Polk's Lessee vs. Wendell*, 9 Cranch, "87; *New Orleans vs. United States*, 10 Pet., 662, 730; "*Wilcox vs. Jackson, dem., McConnell*, 13 Pet., 498, 509; "*Stoddard vs. Chambers*, 2 How., 284, 317; *Easton vs.* "*Salisbury*, 21 Howard, 426, 428: *Reichart vs Felps*, 6 "Wall., 160; *Best vs. Polk*, 18 Wall., 112, 117; *Leaven-* "*worth Railroad vs. United States*, 92 U. S., 733; *Newhall* "*vs. Sanger*, 92 U. S., 761; *Sherman vs. Buick*, 93 U. S., "209; *Smelting Co. vs. Kemp*, 104 U. S., 636; *Steel vs.* "*Smelting Co.*, 106 U. S., 447; *Kansas Pacific Railway* "*Co. vs. Dunmeyer*, 113 U. S., 629, 642; *Reynolds vs. Iron* "*Silver Mining Co.*, 116 U. S., 687."

The learned judge proceeds to analyze the authorities, and then says:

"With the principles so well established by these de- "cisions, of the right in an action at law to prove by "competent extrinsic evidence that a patent of the United "States is void for want of power in the officers to issue it, "and the facts which show that want of power, we come "to the case of *Newhall vs. Sanger*, 92 U. S., 751, which "establishes the proposition that land covered by a Mexi- "can claim was not public land within the meaning of the "act of Congress making the grant to the railroads, but "was reserved from the granting clause of those statutes.

"In *Leavenwooth, Lawrence, etc., Railroad vs. United* "*States*, 92 U. S., 733, decided at the same time with "*Newhall vs. Sanger*, the opinions in both cases being

"delivered by Mr. Justice Davis, the question of the right "to show this want of authority was also very fully dis- "cussed. That was a case in which the railroad company "had brought suit in equity to establish its title to tracts "of land lying within the Osage country, in Kansas, which "had been certified to the Governor of that State as part of "the grant made by Congress to aid in the construction of "certain railroads. This was done by the supposed author- "ity of the act of March the third, 1863, 12 Stat., 772, "granting every alternate section of land in the State of "Kansas, designated by odd numbers for ten sections in "width on each side of said road, and of each of its "branches.

"It also contained the usual reservation, that in case it "should appear when the line or route of said railroad and "branches was definitely fixed, that the United States had "sold any of the land granted, or that the right of pre- "emption or homestead settlement had attached to the "same, then the right was given to select other lands; and "it provided that any and all lands theretofore reserved "to the United States by acts of Congress, or in any other "manner by competent authority, for the purpose of aiding "in any object of internal improvement, or for any other "purpose whatever, be, and the same are hereby, reserved "to the United States from the operation of the act.

"The route of the road in that case was located through "lands which had belonged to the Osage Indians, and to "which their title was not extinguished until September "29, 1869. This court held that, notwithstanding the gen- "erality of the granting clause, it was not intended by that "statute to grant anything but *public* lands of the United "States at the date of the grant, and that the reservation "clause was sufficient to except these lands, then in posses- "sion of the Indians, out of the grant, even if the general "language could be construed to include them. The court

"says: 'A special exception of this land was not necessary "in these grants, because the policy which dictated them "confined them to land which Congress could rightfully "bestow without disturbing existing relations and pro- "ducing vexatious conflicts. The legislation which re- "served it for any purpose, excluded it from disposal as "the public lands are usually disposed of.'

"In the case of *Newhall vs. Sanger*, the object of the "suit was to determine the ownership of a quarter section "of land in California. The patent under which the appel- "lee claimed was issued in 1870, under the act of 1862, "granting lands to railroad companies for the purpose of "constructing a railroad to the Pacific ocean (12 Stat., 489, "492). One of the companies was the Western Pacific "Railroad Company, to which was granted every alternate "section of *public land*, designated by odd numbers, "within ten miles on each side of its road not sold, "reserved, or otherwise disposed of by the United States, "and to which a homestead and pre-emption claim may not "have attached at the time the line of the road was defi- "nitely fixed. The act also declared, as in other cases, "that it should not defeat or impair any pre-emption, "homestead, swamp land, or other lawful claim, nor in- "clude any government reservation or mineral lands, or "the improvements of any *bona fide* settler. The appel- "lant asserted title under a patent of the United States of "a later date, which recited that the land was within the "exterior limits of a Mexican grant called Moquelamos, "and that a patent had, by mistake, been issued to the "company. It was conceded that the land in controversy "fell within the limits of the railroad grant, as enlarged "by the amendatory act of 1864 (13 Stat., 356, 358), the "same act now under consideration, 'and the question "arises,' said the Court, 'whether lands within the bound-

"aries of an alleged Mexican or Spanish grant, which was "then *sub judice*, are public within the meaning of the "acts of Congress, under which the patent wherein the "appellee's title rests, was issued to the railroad company.'

"It will be seen that this is the precise question pre- "sented in the case under consideration, and the Court, "referring to the preceding case of *Leavenworth, Law- "rence, etc., Railroad vs. United States*, 92 U. S., 733, and "reciting the facts that in that case they confined a grant "of every alternate section of 'land' to such whereto the "complete title was absolutely vested in the United States, "proceeds:

" 'The acts which govern this case are more explicit, and "leave less room for construction. The words "public "lands" are habitually used in our legislation to describe "such as are subject to sale or other disposal under the "general laws. That they were so employed in this in- "stance is evident from the fact that to them alone could "the order withdrawing lands from pre-emption, private "entry and sale apply.' The Court then goes on to show "that the status of lands included in a Spanish or Mexican "claim pending before tribunals charged with the duty of "adjudicating it, was such that the right of private prop- "erty could not be impaired by a change of sovereignty, "and that such lands were not included in the phrase " 'public lands' of these specific railroad grants, and that "until such claims were finally decided to be invalid they "were not restored to the body of public lands subject to "be granted."

In this case, as in *Reynolds vs. Iron Silver Mining Co.*, 116 U. S., 687, the defendant in possession, without color of title, set up and maintained that the plaintiff's patent was void.

In discussing this branch of our inquiry, we assume, for the sake of the argument, that the certification of these lands was equivalent to a patent.

Executive officers are the mere creatures of statute. Except as the constitution or law enacted thereunder give them power of jurisdiction, they are without authority to do any act whatever. As before stated, the constitution places the disposal of the public lands in the hands of Congress, and only to the extent that Congress has authorized their sale or disposition can any officer of the United States, by any act, divest the United States of title, or confer title. To complete the jurisdiction, Congress must have—first, designated the officer, and, second, have described the land which he may sell or convey. No officer but the one designated has any power or jurisdiction in the premises, and he can only act upon such lands as Congress directs. If he sells or conveys lands not within the designated power, his act is not voidable, but simply and absolutely void and of no effect whatever; as much so as if he should attempt to coin money, negotiate a treaty, or declare war. To this effect are all the decisions from the adoption of the constitution to the present day.

As early as 1828 a question arose, under the administration of the land laws by the Secretary of the Treasury, involving the disposition of certain entries which had been inadvertently allowed without authority to sell on the part of the public officer. The secretary asked the opinion of Attorney-General Wirt, and that accomplished and renowned jurist replied:

"Lands excepted from sale by acts of Congress, ought not to be sold, and if they have been inadvertently sold, the sale is void for want of authority. * * * * They have not been sold because there was *no power to sell*

them; the sale was *void in its inception.* * * * * Those sales are now in legal contemplation, *mere nullities.* And with the discovery and full knowledge of this fact before us, why should we persist in the error, and affect to clothe with the solemnity of a patent, an act which we know to be *utterly null and void.*" (2 Opin., 186.)

In the case at bar lands have been inadvertently and unlawfully approved to the canal company, not only not included in the grant, but which had been previously appropriated by Congress, and title vested in the State. In the language of the distinguished jurist, such approval is "void for want of authority," "mere nullities," and "utterly null and void." The case is exactly the same as that at bar, and it would be hard to devise stronger or more positive language in which to express the principle announced.

In 1838, Attorney-General Butler, in a like case, commenting upon and re-affirming the opinion of his predecessor, Mr. Wirt, said:

"He held that a sale of land excepted from sale by these acts was void for want of authority, and that the issuance of a patent would not cure its invalidity." (3 Opins., 355.)

In 1848 there arose another case, evoking an opinion of Attorney-General Taney, equally clear and unequivocal. The act of March 3d, 1811, as continued by the act of May 11th, 1820, conferred upon owners of front lots, in Louisiana, certain rights of pre-emption in contiguous back lots, to be exercised in a specified way within a prescribed time, after which the lands were to be subject to disposal to the general public as provided by law. One Alexander McDougal, thus entitled as a pre-emptor, entered a certain tract, paid for the same, and received a certificate of purchase. Afterwards, one Robertson was allowed, by inadvertence, to enter the same tract as private entry, and received a patent therefor. Thereupon the question arose, whether, with the Robertson patent outstanding, a patent could still be issued to McDougal.

The opinion of the attorney-general upon this point was requested by the secretary of the treasury, and it was therein held and decided that the acts of Congress referred to, reserved such lands to such persons as should, within the time, exercise their rights of pre-emption; that such a claim having been so asserted, the lands covered thereby were therefore excepted from the laws disposing of the public domain; that Robertson's patent having been issued for lands, thus excepted from the act under which he claimed, was absolutely null and void; and should be so treated, and that a patent should issue to McDougal. In this opinion the attorney-general said:

"It is an undoubted proposition that if a patent be issued without authority of law, it is *utterly void.* Not being an act done in a court of record, there is no difficulty in the way of treating it as merely void. Indeed, it is impossible to regard it in any other light, without a contradiction in terms." (5 Opin., 9.)

And again:

"There is a clear distinction between this class of cases when there is a defect of authority and another class where the authority is ample, the subject matter with the limits, but the officer is intrusted with discretionary power to decide certain questions, and, in the exercise of that power, he decided, and an act is done, founded upon and in pursuance of that decision. Though the decision be erroneous, the precise power conferred has been exercised in the precise case contemplated, and the officer may be *functus officio.*

"In the other class of cases, where there is *an excess of authority* or *jurisdiction*, even in courts of justice, which are usually shielded by judicial irresponsibility, are no longer protected, and *their acts are void.*" (Idem., pp. 10, 11.) And a patent thereupon issued to McDougal.

The above opinions of the attorney-general, covering a period from the adoption of the constitution to 1848, are clear and plain enunciations of the principle of law which

we are here invoking. So far as our researches have enabled us to learn, they have never been overruled, questioned or doubted by any succeeding attorneys-general, but have always been, and still remain, the undoubted authority of that department upon the question involved.

To the same effect in principle are various decisions of the State and inferior federal courts.

State of Indiana vs. Miller, 3 McLean, 151.
Hunter vs. Hemphill, 6 Mo., 106.
Jackson vs. Lawton, 10 Johns., 26; and cases supra.

To these high authorities have been added a long list of adjudications by the Supreme Court of the United States, covering the identical point. As affecting the case at bar they may be divided into three separate heads, viz.:

1. A patent for public lands is void if the officer issuing it is not duly authorized to do so by law; if it includes lands not granted, or lands reserved from a grant, or lands not subject to sale.

Polk's Lessee vs. Wendall, 9 Cranch, 87.
Polk's Lessee vs. Wendall, 5 Wheat., 293.
Patterson vs. Winn, 11 Wheat., 381.
U. S. vs. Arredondo, 6 Pet., 691.
Stoddart vs. Chambers, 2 How., 285.
Bissell vs. Penrose, 8 Id., 317.
Mills vs. Stoddart, Id., 346.
Minter vs. Cromelin, 18 Id., 87, 89.
Eaton vs. Salisbury, 21 Id., 426, 432.
Reichert vs. Phelps, 6 Wall., 160.
Morton vs. Nebraska, 21 Id., 660.
Sheply vs. Cowen, 91 U. S., 330.
Sherman vs. Buick, 93 U. S., 209.
Smelting Co. vs. Kemp, 104 Id., 636.
Steel vs. Smelting Co., 106 Id., 447.

2. And exactly the same rule applies to a certification resting upon the act of August 3d, 1854.

Dubuque vs. Litchfield, 23 How., 66.
Shepley vs. Cowen, 91 U. S., 330.

3. The question in every case is of jurisdiction in the officer. If he proceeds outside of his statutory power, the act is null and void.

Wilcox vs. Jackson, 13 Pet., 498.
Dubuque vs. Litchfield, 23 How., 66.

1. *The void character of the patent, under the circumstances stated.*

Polk's Lessee vs. Wendall (9 Cranch, 87) was an action of ejectment. The plaintiff relied upon a patent from the State of North Carolina, dated April 17th, 1800, for 5,000 acres of land. The defendant offered in evidence another patent from the State, dated August 28th, 1795, for 25,060 acres, including the same land. To the admission of this patent objection was made, upon the ground among others, that under the laws of the State no grant could lawfully issue for the quantity of land contained therein, and that the same was therefore void as an act in excess of authority and jurisdiction. This objection was overruled, and exception having been taken, the point formed one of the questions raised by the writ of error in the Supreme Court. Disposing of it, Mr. Chief Justice Marshall, delivering the opinion of the Court, said:

"The first exception is to the admission of the grant set up by the defendants in bar of the plaintiff's title. The objection alleged the grant to be absolutely void for three causes. The first is that no grant could lawfully issue for the quantity of land expressed in this patent. *If this objection be well founded it will be conclusive.* Its correctness depends upon the laws of the State of North Carolina."

The court then found that the laws of the State did not restrict the quantity, and the action of the court below, in that particular ruling, was for that reason, sustained.

In the court below, the plaintiff, among other things, offered to prove certain facts showing that the land conveyed by the larger patent, was not of the class of lands

subject to location and grant. It was claimed that no authority to issue the warrant for survey, or the patent, existed, except upon a previous *entry*, and that no such entry, in fact, was ever made.

In other words, it was claimed that the lands were excluded, instead of included, in the power conferred upon the granting authority. The offer of testimony tending to show this was refused, and exception being taken, this question was directly presented upon the writ of error, and the court sustained the exception, reversed the judgment below, and remanded the cause for a new trial. In its opinion, the court, on this point, said:

"But there are cases in which the grant is *absolutely void;* as when the State has no title to the thing granted or *where the officer had no authority to issue the grant.* In such cases, the validity of the grant is necessarily examinable at law."

It will be here observed that the Supreme Court, thus early, in unequivocal language, sustained the exact point for which we are now contending, and that in a material matter, on which the whole case before it turned. It remanded the cause to enable the plaintiff to prove that the patent in question was void because issued without jurisdiction by the granting power.

The same case subsequently reached the Supreme Court after new trial, upon exception to rulings of the trial court excluding testimony offered in accordance with the opinion above quoted, and the court again remanded the case for new trial for the admission of such testimony and reaffirmed the doctrine above stated in exactly the same languauge. (*Polk's Lessee vs. Wendall*, 5 Wheat., p. 291.)

In *Patterson vs. Winn*, 11 Wheat., 381, the question again arose and was decided. The action was ejectment, and the plaintiff, to sustain his title, offered in evidence a patent of the State of Georgia for 7,300 acres of land. The admission

of this patent was objected to on the ground that under the laws of the State no patent could issue for a greater quantity of land than 1,000 acres, and that the patent in question was, therefore, "absolutely void." The court below divided in opinion, and upon certificate of division the question came to the Supreme Court, and was there decided. The court refer to the cases of *Polk's Lessee vs. Wendall* (*supra*), as having already settled the point, and also, approvingly, to the case of *Jackson vs. Lawton*, 10 Johns., 23, to same effect, and then restate the doctrine as follows:

"We may therefore assume, as the settled doctrine of this court, that if a patent is absolutely void upon its face; or the issuing thereof was without authority; or was prohibited by statute; or the State had no title, it may be impeached collaterally, in a court of law, in an action of ejectment."

In *United States vs. Arredondo*, 6 Pet., 691, speaking of the acts of public officers, in respect to their binding force, collaterally, and commenting favorably upon the decision in *Polk's Lessee vs. Wendall*, the court said:

"The only question that can arise between an individual, claiming a right under the acts done, and the public, or any person denying its validity, are *power in the officer* and fraud in the party."

The case of *Stoddart vs. Chambers*, 2 How., 285, was an action of ejectment. The plaintiff relied upon an old Spanish concession; the defendant upon a later location made with a New Madrid certificate or scrip, consummated by a patent. The New Madrid certificate, according to the act of February 17th, 1815, authorizing its issue (3 Stat., 211), was locatable "on any of the public lands of said territory, the sale of which is authorized by law." The tract in question was within the general body of lands authorized to be sold, the proceedings for its appropriation were all regular,

and the patent advisedly issued in due form. Upon examination of the various acts of Congress relating to the confirmation of Spanish titles, however, it was found that, at the date of the New Madrid location, the premises were regularly claimed under the Spanish title, and that such claim was *sub judice*, in the tribunal authorized by law to hear, determine and confirm it. Thus finding, the court held that the land was not "authorized by law" to be sold at the date of the New Madrid location, and that such location and the patent upon it were absolutely null and void. The syllabus of the case is in part as follows:

"The holder of a New Madrid certificate had a right to locate it only on public lands which had been authorized to be sold. If it was located on lands which were reserved from sale at the time of the issuing of the patent, the patent is void. * * * A patent is a mere ministerial act, and if it is issued for lands reserved from sale by law, it is void."

And in delivering the opinion of the Court, Mr. Justice McLean, after reciting the facts above noted, said:

"On the above facts the important question arises, whether the defendant's title is not void. That this is a question as well examinable at law as in chancery will not be controverted. That the elder legal title must prevail in the action of ejectment is undoubted. But the inquiry here is, whether the defendant has any title, as against the plaintiffs. And there seems to be no difficulty in answering the question that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved, and this was the case when the patent was issued. * * * * * * No title can be held valid which has been acquired against law, and such is the character of the defendant's title, so far as it trenches on the plaintiff's. * * * It is true a patent possesses the highest verity. It cannot be contradicted or explained by parol; but if it has been fraudulently obtained or issued against law it is void. * * * The patent of defendant, having been for land reserved from such appropriation, is void."

In the case of *Bissell vs. Penrose*, 8 How., 317, the same question arose under almost identical circumstances, in a conflict between a Spanish title and a New Madrid location, and the court, referring to *Stoddart vs. Chambers*, and reciting the facts then before the court, said:

"The Court decided that the plaintiff, deriving title under the confirmed claim, held the better title, on the ground that in 1816, when the New Madrid certificate was located upon the premises in question, the tract was reserved from sale at private entry, by virtue of the 10th section of the act of 1811, and being thus reserved, the location was void."

And again:

"But if this question were an open one, and to be decided the first time by the Court, we should feel ourselves obliged to reaffirm the same conclusion we have supposed necessarily involved in the case already mentioned."

In *Mills vs. Stoddart*, 8 How., 346, the same question upon the same title involved in *Stoddart vs. Chambers* again arose and was decided, the Court reaffirming its position in the two preceding cases, the syllabus of the report being as follows:

"The holder of a New Madrid certificate had a right to locate it only on public lands, the sale of which was authorized by law. But the lands claimed under a Spanish Concession, where the claim has been filed according to the acts of Congress, were reserved from sale when the entry under the New Madrid certificate was made, viz., in 1816. Consequently the entry was void."

The case of *Minter vs. Cromelin*, 18 How., 87, 89, was ejectment arising as follows: The plaintiff claimed title, under a patent of the United States, issued upon a pre-emption certificate, dated June 4th, 1829. The defendants claimed under mesne conveyance from one

Fexico, an Indian warrior, to whom, in 1820, there had issued a certificate under the treaty of August 9th, 1814, with the Creek Indians, and the act of March 3d, 1817, in execution thereof. On the part of the defendant, it was claimed that the pre-emption certificate and patent upon which plaintiff relied were void, because made for lands previously appropriated under the Indian certificate. In deciding the case, the Court, in its opinion by Justice Catron, said:

"The State Court, in effect, pronounced the patent under which the plaintiffs claim title, to be void for want of authority in the officer of the United States to issue it, on the supposition that the land was reserved from sale when it was entered and granted. The presumption is that the patent is valid and passed the legal title; and, furthermore, it is *prima facie* evidence of itself that all the incipient steps had been regularly taken before the title was perfected by the patent. It has been so held by this Court in many instances, commencing with the case of *Polk vs. Wendall*, 9 Cr., 98, 99.

But if the executive officer had *no authority* to issue the patent because the land *was not subject to entry and grant, then it is void*, and the want of power may be proved by a defendant at law."

In *Easton vs. Salisbury*, 21 How., 426, the question again arose on a New Madrid location and patent for lands reserved on account of a Spanish claim, and for the fourth time the Court announced the law in these words:

"The President of the United States has no right to issue patents for land, the sale of which is not authorized by law. * * * The location was not only *voidable, but it was absolutely void*, as it was made on lands subject to a prior right."

The case of *Reichert vs. Phelps*, 6 Wall., 160, is one directly in point. The action was ejectment, Reichert, the plaintiff, claimng title under a patent of the United

States, issued upon a private entry. The defense was, that the premises in controversy were reserved from sale by reason of the claim of certain inhabitants of foreign birth, whose rights were protected by law, and that the plaintiff's title was therefore void. And the Court so held, and in its opinion Mr. Justice Grier said:

"The plaintiff claimed under two patents of the dates of 1838 and 1853, which exhibit conclusive evidence of title if the land claimed had not been previously granted, *reserved from sale*, or appropriated. The only question to be decided in this case is whether the land had been so granted, *reserved*, or appropriated."

And upon examination, finding the lands to have been reserved, the patents were declared void.

The case of *Morton vs. The State of Nebraska*, 21 Wall., 660, arose in the following manner: Certain lands containing saline were in possession of the State, under claim of title. Morton, the plaintiff, claimed title under a patent of the United States founded upon private entry, and brought ejectment. The claim of the State, as against this patent, is thus stated in the opinon of the Court, by Justice Davis:

"The State of Nebraska, the real defendant in the case, insists that the locations were without authority of law, because the lands on which the warrants were laid were saline lands, and therefore not subejct to entry. If this be so, there is an end of the case, and we are relieved of considering the other questions raised by the record."

The Court then proceeded to a detailed examination of the law on the subject, holds that saline lands were not subject to entry, and sustains the proposition of the State. Further proceeding, the Court said:

"It does not strengthen the case of the plaintiffs that they obtained certificates of entry and that patents were issued on these certificates. It has been repeatedly decided by this Court that patents for lands which have

been previously granted, *reserved from sale* or appropriated, *are void.*"

In *Shepley vs. Cowen*, 91 U. S., 330, the question was between the patentee of the State of Missouri under a location of the premises made in part satisfaction of the 500,000 acres internal improvement grant (Section 8, act of September 4th, 1841), and the patentee of the United States under a pre-emption claim. As against the State selection, approval of same to State by the United States, and patents of the State to the plaintiff, it was claimed that all of these proceedings were ineffectual and void because made of lands not open to selection, by reason of the fact that they were claimed to lie within the common villages of St. Louis and Carondelet, confirmed to said villages by act of Congress. The Court, in an elaborate opinion so held, and Mr. Justice Field, delivering the opinion, said:

"In considering the validity of this title, the first question for solution is, whether the premises were open to selection by the State. * * * If not thus open, the whole proceeding on the port of McPherson and the Governor of the State to appropriate the lands *was ineffectual for any purpose.* That the land was not thus open we think there is no doubt."

It will be observed that in this case the question related to a certification made to a State of lands not included in the granting act or subject to selection, exactly the situation in the case at bar, and that as soon as the fact was made to appear, the Court unhesitatingly pronounced the entire proceeding "*ineffectual for any purpose.*"

In the case of *Sherman vs. Buick*, 93 U. S., 209, a controversy arose between a patent of the United States, under the pre-emption law, and a patent of the State of California, based upon the school grant made by the 6th

section of the act of March 3d, 1853. The plaintiff, in aid of his patent from the United States, and to defeat the title of the State, by way of showing want of power in the officers creating it, offered to prove his settlement, residence, filing and proof. The Court below examined this testimony, and the correctness of this ruling was one of the questions presented to the Supreme Court by the writ of error, and Mr. Justice Miller, in delivering the opinion of the Court, said:

"The effect of the evidence was to show that the title set up by the defendant under the State was void—not merely voidable, but void *ab initio*. For this purpose it was competent and sufficient, for it showed that when the survey was actually made and the land in question was found to be part of section 36, plaintiff had made a settlement on it, within the meaning of the 7th section of the act of 1853, and the State could do nothing but seek indemnity in other lands.

"It has always been held that an absolute want of power to issue a patent could be shown in a court of law to defeat a title set up under it, though when it is merely voidable the party may be compelled to resort to a court of equity to have it so declared."

The case of the *Smelting Co. vs. Kemp*, 104 U. S., 636, was an action to secure possession of real property. The plaintiff introduced in evidence a patent to its grantor from the United States, issued under the placer mining laws. The defendant offered in evidence a certified copy of the proceedings in the land office upon which said patent was based, which was objected to on the ground that the patent could not be thus collaterally attacked by showing irregularity in the attendant proceedings. The court below overruled the objection, admitted the testimony, plaintiff excepted, and the question thus raised was one of the errors assigned in and decided by the Supreme Court. The court, in the opinon by Mr. Justice Field, discussed the question at great length, in all its bearings, and while holding that

a patent of the United States could not be collaterally impeached in a court of law, by reason of any alleged informality or irregularity in the proceedings upon which it is based, yet at the same time took occasion to point out specifically and in unmistakable language, the plain line of demarcation between a patent thus protected and one issued without authority or jurisdiction. Upon this point the court said:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it, that is to say, in a case where the lands belonged to the United States and provisions had been made by law for their sale. If they never were public property, or had been previously disposed of, or if Congress *had made no provision for their sale, or had reserved them*, the department would have no jurisdiction to transfer them, and its atempted conveyance of them would be *inoperative and void*, no matter with what seeming regularity the forms of law may have been observed" (p. 641).

And, reciting the conditions rendering a patent "void on its face," the court further said:

"It is meant that the patent is seen to be invalid, either when read in the light of existing law or by reason of *what* the *court must take judicial notice of;* as for instance, that the land is reserved by statute from sale, or otherwise appropriated, or that the patent is for an unauthorized amount, or is executed by officers who are not intrusted with the power to issue grants of portions of the public domain."

In *Steel vs. Smelting Company*, 106 U. S., 447, speaking of the same question, and as to the same title, the court again said:

"It need hardly be said that we are here speaking of a patent issued in a case where the Land Department had jurisdiction to act, the lands forming part of the public domain and *the law having provided for their sale.* If they never were property of the United States, or if *no*

legislation authorized their sale, or if they had been previously disposed of, or *reserved from sale*, the patent would be inoperative to pass the title, and objection could be taken to it, on these grounds, at any time and in any form of action."

We invite careful attention to the two cases last above cited, for they are late decisions, summing up the adjudications on the same subject, and are absolutely conclusive of the question at bar. They declare that a patent issued for lands which Congress had previously disposed of, or otherwise appropriated, or "had reserved" from such disposition, would be "inoperative and void;" "would be inoperative to pass the title," and that the objection can be taken "at any time and in any form of action." And further, that such a patent is *void on its face*, whenever the above mentioned defect appears by any thing of which the tribunal proceeding in the matter must take judicial notice.

We submit that the above authorities settle beyond all further question the proposition we advance under this head, to-wit: That in law, the certification or approval of these reserved and excepted lands, was and is absolutely null and void, and ineffectual for any purpose, and that the tracts in question remain a part of the undisposed of public domain, subject to the operations of general laws.

The government has always recognized and protected the occupants and settlers upon domain; they are in no sense trespassers. (*Rector vs. Gibbon*, 111 U. S., 276, 293.)

2. *The above principles apply alike to patents and certifications.*

What, in a patent is a void conveyance is likewise void in a list or certification of lands in cases when patents are not provided for. This method of evidencing a grant by certificate was at first a power assumed by the executive

entirely without authority, and it never had any sanction of law and has none now, except as found in the act of August 3d, 1854. But if in any event the act itself reaches the dignity of a patent, it is subject to the rules of law governing a patent. Still more so as a conveyance of less dignity and formality. And the Supreme Court has several times applied the rule directly to these lists or certifications.

The case of the *Dubuque & Pacific Railroad Company vs. Litchfield*, 23 How., 66, is one of a long series arising under what is known as the Des Moines river grant. The dispute arose as to the lands lying along the river north of the Raccoon Fork, which had been certified or listed to the State of Iowa, in supposed conformity to the grant of August 8, 1846. The plaintiff relied upon a subsequent grant from Congress. If the river grant extended above Raccoon Fork, it was conceded that the railroad had not title. The case, therefore, involved two inquiries, first, the extent of the river grant; second, if limited to the lands below the fork, the effect of the certification of the lands above that point. Upon the first of said points the courts decided that the grant was limited to lands below the fork, and upon the second, said:

"No authority was conferred upon the executive officers administering the public lands to do more than make partition between the tenants in common, Iowa and the United States, in the manner prescribed by the act of Congress. The premises in dispute lie sixty miles beyond the limits of the tract granted. It was, therefore, impossible to make partition, under this grant, of lands lying outside of its boundaries, and all attempts to do so were *merely nugatory*. It follows that the plaintiff below has no title, and his action must fail."

In *Shepley vs. Cowen*, 91 U. S., 330, the lands in controversy had been listed or approved to the States under

the 500,000 acre grant, and the court, as we have already seen, declared, that inasmuch as the lands were not open to selection, the whole proceeding to acquire the title was "ineffectual for any purpose."

In *Frasher vs. O'Connor*, 115 U. S., 102, which was a suit in ejectment, plaintiff relied upon a listing of lands to the State of California, upon their selection for school sections lost, in place thereof. The defendants were pre-emption claimants, and defended against the State title by alleging *inter alia*, that at the date of the State lieu selections, the lands selected were within the claimed limits of an unsettled Mexican grant, pending *sub judice* were hence not subject to selection, and the selection and listing were void. And the court, while holding that the listing had the force and effect of a patent, admitted this defence, examined the entire question, and decided, upon the facts, that the lands were open to selection, and the list therefore not void.

In *Mower vs. Fletcher*, 115 U. S., p. 380, when a like listing was in question, the court again recognized the admissibility of such a defense, but decided the case against the pre-emptor, under the doctrine of *Atherton vs. Fowler*, 96 U. S., 513.

3. *The question is simply one of jurisdiction or power.*

The only chance of misapplying the law of the case lies in the possible misapprehension of the primary distinction, noticed in all the cases, between an act done within the jurisdiction of the special tribunal and one done entirely without jurisdiction. This lies at the very root of the matter. If the act is done in the exercise of an established jurisdiction, no matter how irregular or erroneous it may be, it is *voidable* only, and not void. It may be remedied in certain cases by direct proceedings for its vacation, but until it is so vacated it cannot be attacked

collaterally. Of such character, for example, are the findings or determinations in matters of fact by executive officers acting with jurisdiction over the subject matter in contested cases. The courts have repeatedly decided that such decisions are final and conclusive. On the contrary, if the act done is not within the scope of the power conferred upon the particular tribunal, the act is absolutely void. It needs no vacation. It is exactly as though it had never been done. It binds no one. And the objection can be raised anywhere, by anybody, whenever, in any proceeding, the question becomes material.

But probably as succinct and terse a definition of the distinction as can be found in the books, is that adopted by the Supreme Court in *Wilcox vs. Jackson*, 13 Peters, 498 *supra*. It was claimed that the act of the register and receiver in allowing the pre-emption entry of Beaubien was a judicial act, and therefore conclusive and irreversible. To this argument the Court replied:

"This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there is such an appellate power, the judgment is conclusive when it only comes collaterally into question so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this court in the case of *Elliott et al. vs. Piersal et al.*, 1 Pet., 340, in these words: 'When a court has jurisdiction, it has a right to decide every question which occurs in the course, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.'"

Thus in the case at bar, and applying the clear doctrine of all the cases above cited, the approval of these lands to

the State was an act absolutely without jurisdiction and void. They were, as already pointed out, not only not included in the granting act, but at time of passage of plaintiff's act and certification, were not subject to any action of the department. No other act could or did give the land department power or authority over these lands until the act of March 2, 1889.

THE SELECTION AND CERTIFICATION TO THE CANAL COMPANY WERE ALSO VOID, BECAUSE THE LAND IN QUESTION WAS NOT SUBJECT TO PRIVATE SALE.

The grants for canal purposes expressly limit the grants to lands "Subject to private entry." The authority to the Canal Company to make the selections, and under which its agent acted as the agent of the State in selecting them under the State's commission, as we have seen, contained the same limitation.

No lands are subject to private entry until they have been first offered at public sale.

(*Eldred vs. Sexton*, 19 Wall, 189.)

The two grants to the Canal Company are to be construed in *pari materia*. (*Kansas City, &c., vs. Attorney General*, 118 U. S., 682).

The lands were never offered at public sale, as shown by the evidence in the Land Office. (Record, p. 177, fol. 303; *Id.* p. 175, fol. 300).

The order for the restoration of the lands to public sale was not made until May 29, 1873, and was immediately countermanded by telegram. (Record, p. 110, folio 191, p. 111, top.)

Moreover, even if it were true that any of the releases of this land were executed in accordance with the joint resolution of Congress of July 5, 1862 (*supra*, p. 18), the

lands in question were never offered for public sale, as were the others, or legally surrendered, as required by the last paragraph of that joint resolution, as follows:

"And it shall be the duty of the Commissioner of the "General Land Office to re-offer for public sale in the "usual manner the lands embraced in the lists of sur- "rendered lands aforesaid, when duly filed in the office, "as herein directed."

EVEN IF THE GOVERNOR HAD IN TERMS ASSUMED TO RELEASE THESE LANDS, HIS ACT WAS VOID AND OF NO EFFECT.

The act granting the railroad lands, June 3, 1856, expressly limits the disposition of the lands to the State Legislature, and see 28 Mich., 379, *supra*, and *Fenn vs. Kinsey*, 45 Mich., 446.

As we have seen, the legal title was in the State as effectually as was the legal title of the Capitol grounds, or of swamp lands.

It is hardly necessary to argue that the Governor has no powers except such as are expressly conferred by the Constitution.

Speaking of the distinction between legislative and executive duties, Judge Cooley, in his Const. Lim., says, paragraph 114: "The authority that makes the laws has large discretion in determining the means through which they shall be executed," and adds that it can be definitely said that such powers as are especially conferred by the Constitution upon the Governor, or upon any other specified officer, the Legislature cannot require or authorize to be performed by any other officer or authority; and from these duties which the Constitution requires of him

he cannot be excused by law. "*But other powers or duties the executive cannot exercise or assume except* by the legislative authority." In note 1 to paragraph 115 he cites the following from *Field vs. People*, 2 Scam., 80: "In deciding this question (as to the authority of the Governor) recurrence must be had to the Constitution. That furnishes the only rule by which the Court can be governed. That is the character of the Governor's authority. All the powers delegated to him by or in accordance with that instrument he is entitled to exercise, and no more. The Constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power except such as is clearly granted by the Constitution."

See opinion of Mr. Justice Jackson, and cases cited (Record, p. 24), and of Mr. Justice Brown (Record, p. 29).

ESTOPPEL.

As we have seen, any claim of the Canal Company on this ground is thrown outside the lines of any known rule or precedent applying the doctrine between private persons, by the evidence itself.

Passing the settled rule that title to realty can never pass by estoppel (34 Mich., 84), and distinguishing it from the case in which a person may be estopped from asserting a claim for restoration of title, actually and technically passed, we assert the principle that the doctrine of estoppel has no place when presented as to a State or a nation.

"There is no case," says the court, in *Taylor vs. Shufford*, 4 Hawks Law (N. C.), 116, "where the sovereign power has been estoppel; the cases are all the other way, and policy and justice require that they should be so. This sovereign, or sovereign power, is a trustee for the people;

it acts by agents; the people should not be bound by any statement of facts made by those agents. For their benefit the truth may always be shown." This was a case of two grants.

But without going into citation of authorities, we content ourselves with the submission of a case decided by the Michigan Supreme Court, involving this same grant and its attempted manipulations by the State. (*Fenn vs. Kinsey*, 45 Mich., 446.)

The case was ejectment. Plaintiff Fenn sued to recover lands in Kent County which had been selected and set apart as appropriated to aid a road from Owosso to Grand Haven, under grant of 1856. Plaintiff claimed under conveyance from one Bowers, who claimed under grant from the Port Huron & Lake Michigan Railroad Company, to which the land had been granted by the State board of control and the Governor in 1873 (after expiration of the ten years).

This action of the board and Governor the Court says it held unlawful in *Bowers vs. Haywood*, 35 Mich., 241, and adds that, had the title stood without further action, there could be no doubt of the plaintiff's failure to prove any right, and then continues: "But it is now claimed that this title, which was void in its creation, was afterwards made good by confirmation." * * * "The lands became subject, in 1857, to appropriation by the board of control to such proper party as should be competent to build a railroad from Owosso to Grand Haven, by reason of the failure of the Detroit & Milwaukee Company to accept the act of 1857. The board of control, in August, 1857, transferred the grant and privileges to certain gentlemen as trustees, who never took any steps to carry out the work, and who subsequently released all of their

claims to the State. Nothing further was done until 1871, when the board of control resolved that, if it could lawfully be done, it would be proper to transfer the grant to the Port Huron & Lake Michigan Company. In 1873 a further resolution was passed, declaring, in substance, that this company was engaged in building a road * * * * from Grand Haven to Flint and thence to Port Huron, and *releasing the grant* to this company. * * * On May 30, 1873, the Governor made a patent purporting to be issued under this reolution and to convey to the company the interest of the State in these lands."

All this time the company had neither built nor intended to build west of Owosso, and had built nothing west of Flint.

The company deeded to Bones, immediately, his successors and assigns, under some trust deed not in evidence in the case.

In 1877 the Legislature passed an act to ratify and confirm the acts of the Governor and board, and giving their conveyance effect from its date (Laws of 1877, p. 121).

On March 3, 1879, Congress released to the State of Michigan the reversionary interest of the United States.

The Court continues (p. 450): "At the time when the act of 1877 was passed, it is beyond question that the State was bound by the terms of the Congressional grant, which were formally accepted by the law of 1857, to dispose of none of these lands, except for the specific purposes named in the Act of Congress. As the United States reserved a right to all lands not legally disposed of under the trust, and, under the grant, the State itself had no power to divert them, the Act of 1877 was in direct violation of that clause of the Constitution of the United States which declares that no State shall pass any law violating the obligation of contracts. To hold that such a law operated by way of estoppel would be in effect to destroy the weight

of the Constitutional provision. The only proper way to construe void legislation is to treat it as absolutely void until the legislative power, after obtaining authority to do so, sees fit to re-enact it. Congress did not attempt to bind the State to carry out its illegal action, and could not have done so. Any State Legislature, after 1879, had a right to treat that legislation as if it never had been passed, and a mere release from the obligation of the original contract by Congress could not operate to ratify the illegal action of the State Legsilature. It is for the State itself, now that it has plenary power, to act as if there had been nothing done before."

And see the opinions of Jackson and Brown, J.J., and cases cited (Record, pp. 24, 29).

THE DONAHUE CASE.

The Court below, yielding to the contention of the plaintiff, held that the first and *authorized* releases under the joint resolution of July 5, 1862, were effectual to release the entire title of the State in and to all the lands within the common granting limits of the Marquette and State Line and the Ontonagon and State Line routes, as originally laid out.

This cannot be so.

At the time of the passage of the joint resolution of July 5, 1862, authorizing the change of route of the Marquette and State Line, swinging it out of the common limits, there yet remained under the limitations of the original granting act of June 3, 1856 (Section 4), four (4) years in which to build and complete the Ontonagon and State Line road, and the whole grant along that line was

still in the State of Michigan in trust for that purpose.

Neither the joint resolution of Congress nor any act or resolution of the State of Michigan assumed to authorize the release of any land, or of any interest in land in common, or otherwise, held by the Ontonagon and State Line Company, or for the construction of its road, which was still contemplated.

And no release by the State, or by any company, purported to release any such interest.

It is true that a description of the lands which had been held in common was attached to such releases, but no interest in those descriptions was released, save the interest of the Marquette and State Line road, on that held for it in trust by the State.

If A has an interest in a piece of land in common with B, and executes a quit-claim of his interest in that land by description to C, he conveys only his undivided interest, and does not and cannot affect B's undivided interest.

But the joint resolution of July 5, 1862, took the Marquette and State Line out of the common limits, and left the entire grant of six (6) sections per mile free and clear on each side, to the Ontonagon and State Line road along its whole route, as originally granted by the act of June 3, 1856.

I repeat that the original granting act did not contemplate intersections, but did grant *in presenti* the entire complement of land, clear, to this line, as laid out by its map of definite location. The joint resolution of July 5, 1862, conferred upon the Marquette and State Line, as changed, "The same rights in said new line (The Mar-"quette and State Line, as changed), as though the same "had been originally located under said act" (of June 3, 1856; see last paragraph in Section 1).

But whether or not the change of route of the Marquette and State Line road resulted in leaving the *whole*

interest in the State for the benefit of the Ontonagon and State Line road, at the point where the intersection had originally existed, there can be no doubt that a moiety at least remained undivested, if its release was never authorized by law.

If the release was without authority, even if in terms it covered this interest (which it did not), then the decision in the Cunningham case as to the invalidity of the last set of releases concludes this question.

Congress considered this question, and especially contemplated the forfeiture of this moiety in the forfeiture act of March 2, 1889. Section 4 covers it in these words:

"Nor shall the moiety of the lands granted to any rail-"road company on account of a main and a branch line "appertaining to uncompleted road, *and hereby forfeited*, "within the conflicting limits of the grants for such main "and branch lines, when but one of such lines has been "completed, inure, by virtue of the forfeiture hereby de-"clared, to the benefit of the completed line."

In any case, the Canal Company could not select these lands under its grant, because (first) the lands are not "subject to private entry;" and (second) because it could not make a selection from an undivided interest in lands; and Donahue is certainly protected by the last clause in Section 3 of the forfeiture act, because his was a "Bona fide pre-emption claim on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States." Such claims are absolutely and unconditionally confirmed by the forfeiture act.

THE PLAINTIFF CAN ONLY RECOVER ON THE STRENGTH OF HIS OWN TITLE.

Mr. Justice Bradley, in delivering the opinion of this Court in Hardin vs. Jordan, 140 U. S., at page 379, said:

"According to the settled course in actions of ejectment, "the Court did not inquire into the validity of the title "claimed by the defendants, as compared with that of "the plaintiff, but confined itself to the question of the "validity of the plaintiff's title to the land in dispute, on "the assumption that the plaintiff must stand or fall by "his own title, and not by reason of any defect in the title "of the defendant. Recognizing this as the governing "rule in the case," etc.

It is settled in this jurisdiction that this is so, even as against a mere intruder.

Doolan vs. Carr, 125 U. S., 618.
Reynolds vs. Iron Silver Mine Co., 116 U. S., 698.

See the opinions and cases cited—Mr. Justice Jackson and Mr. Justice Brown, at p. 24, fol. 45, p. 30, fol. 57 et seq., of the record.

But these settlers are not intruders, and within the dissenting opinion of the Chief Justice in the cases of Doolan vs. Carr, and Reynolds vs. Iron Silver Mine Co., the defendants in this case would be permitted to put the plaintiff to his proof.

The defendants do not occupy the position of naked trespassers.

A grant is of greater weight than a patent.

Whitney vs. Morrow, 112 U. S., 696-698.

And a person having a vested right to a patent is to be regarded as much the absolute owner as if patent had issued.

Stark vs. Starrs, 6 Wall., 402.
Wirth vs. Benson, 98 U. S., 118.

It is the policy of the Government to protect occupants and settlers upon the public domain, especially when their settlements are under color of the laws of the United States.

Rector vs. Gibbon, 111 U. S., 276-285 et seq.

The forfeiture act of March 2, 1889, is a grant to bona fide pre-emption settlers, who were upon the land on May 1st, 1888 (Section 3, last paragraph); and Section 5 recognizes all settlers as homesteaders who were upon the land forfeited by the act, and they are allowed, when making final proof, for the time they had already resided upon the land up to the date of the passage of the act.

CONSTRUCTION OF THE FORFEITURE ACT OF MARCH 2, 1889, IN SO FAR AS IT AFFECTS THE CANAL COMPANY AND PRE-EMPTION SETTLERS.

The contention of the Canal Company that its title is confirmed by Section 3 of that Act must fail on three grounds:

(First) Because it is excepted from the general provisions of Section 3 by the specific mention of, and complete provision for it in the second proviso of Section 2.

And (second) because if Section 3 stood alone, the Canal Company and its selections from the old railroad grant are not within its terms.

And (third) because the last paragraph of Section 3 confirming pre-emption claims under color of the laws of the United States is conclusive against any construction of that section favorable to the Canal Company or anyone else *as against these defendants* who were "in possession and occupancy" as pre-emptionists "under color of the "laws of the United States on May 1st, 1888."

There is no ambiguity about Section 2.

By the terms of the second proviso, the Canal Company is left in *statu quo* so far as its rights existed to appeal to the courts (which they have done here), or to the Congress for indemnity; but these rights are limited by the terms of the act to those rights only "to which they may *now* be entitled."

And to make assurance doubly sure, it is provided as to the Canal Company that "This Act shall *not* be construed "to prejudice any right of forfeiture, as hereby declared, or "recovery of the United States in respect of any of the "lands *claimed by said companies*, nor to the prejudice of the "right of any person claiming adversely to said companies "(these defendants) under the laws of the United States."

There is no doubt under the authorities as to the rule of construction in the case.

The converse of the maxim "*Expressio unius est exclusio alterius*" (Coke on Littleton, 210 A) is true; that where a statute gives an express remedy to an expressly named individual in a distinct proviso, and then another and greater remedy to a class of individuals of which the one expressly named may be one, the express naming of the one would exclude that one from the effect of the general act.

"It is a general rule of right reason that general words "may be qualified by particular clauses of a statute, but "that on the other hand, a thing which is given in particu-"lar shall not be taken away by general words. This in the "civil law is expressed by the phrase, '*In toto jure generi* "*per speciem derogatur, et illud potissimum habitum* "*quod ad speciem directum est.*"

"In the less classical Latin of the early English law, the "same idea is conveyed in the words, '*Generalis clausula*

"*non porrigitur ad ea quae specialiter sint compre-*
"*hensa.*"

Pomeroy's Sedgwick on Construction (2d Ed.), p. 361.

In conformity to this doctrine it is held that "Where a "general intention is expressed in a statute, and the act "also expresses a particular intention, incompatible with "the general intention, the particular intention shall be "considered as an exception."

Churchill vs. Crease, 5 Bingham, pp. 177-180, Best, C. J.

"The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would override the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

Pretty vs. Solly, 26 Beavan, 606.

And see directly in point

Dewinton vs. Moyor (Ib. 533-543).

"When the intention of the lawgiver, which is to be sought after in the interpretation of a statute, is specifically declared in a prior section, as to a particular matter, it must prevail over a subsequent clause in general terms, which might, by construction, conflict with it. The Legislature must be presumed to have intended what it expressly stated, rather than that which might be inferred from the use of general terms."

State, Bartlett, pros., vs. Inhabitants of City of Trenton, 38 N. J. L., p. 68.

To the same point see Smith vs. Bell, 10 M. & W., 378.

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"Where a general act of Parliament confers immunities which expressly exempt certain persons from the effect and operation of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law; for the introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions."

See Dwarris on Statutes (2nd Ed.), 605.
Broom's Legal Maxims (7th Ed.), p. 666.

"The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to c ses not intended by the Legislature to be brought within its purview."

Per Story, J., in Minis vs. United States, 15 Peters, pp. 423-445.

"However broad some of the expressions of a statute may be, yet, if on such examination, it shall clearly appear that they are and were intended to be limited by other provisions of the same or other acts on the same subject, it cannot be improper to restrain them accordingly."

The Elizabeth, I. Paine (U. S.), p. 11 (Livingston, J.).

It is a primary rule in the interpretation of statutes that where any cause of doubt arises, although apparently the doubt attaches to a particular clause, the whole statute is to be read together and examined, to arrive at the legislative intent; and no construction is proper which would leave without effect any part of the language used.

Pomeroy's Sedgwick on the Construction of Statutory and Cons. Law, pp. 199-360.
Am. & Eng. Enc. of Law, Vol. 23, p. 309, and cases cited.

The Forfeiture Act was aimed at the Canal Company's selections on the Ontonagon and State line grant.

Section 3 confirmed all the private entries, cash entries, homestead entries, pre-emption entries, public sales, private sales, entries of bounty lands, sales of town sites, school land entries, Agricultural College land entries, swamp land entries, and indemnity entries for swamp lands failing under State selections, and other like indemnity entries, all provided for in the "Public Land Laws of the United States," and all of which, having been made since June 3, 1856, would, but for the confirmation of Section 3, have been swept away by the general terms of the forfeiture act.

See many of these entries introduced by plaintiff in evidence (Rec., p. 178).

Limitations are carefully made upon all the confirmatory clauses, however, so as to exclude any possible construction that would interfere with the homesteaders and settlers upon the portion of the grant claimed by the Canal Company.

So Section 3 provides for the confirmation of every claim upon the said railroad grant made under color of the Public Land Laws, "where the consideration received is still retained by the government."

The next clause of the section indicates by the definite article "the original cash purchasers" as those referred to in the confirmatory clause as having paid a consideration still retained by the United States.

Selections under the canal grant are not selections "under color of the *public land laws*."

"Public land laws" are used in a perfectly well settled sense as covering the general land laws of the United States, and never as embracing special or private acts.

The Revised Statutes, Title XXXII., and the Supple-

ment—"The Public Lands" (R. S., p. 390), are the public land laws, and in no case include specific grants.

They do include the swamp land grant to the States generally, and in like maner, grants for school lands, Agricultural College lands, bounty lands, indemnity lands, and so on, to the States generally.

"State selections in Michigan confirmed by the Secretary of the Interior" cannot refer to the selection by the Canal Company, even if Section 3 stood alone unaffected by Section 2 and Section 4. The only selections "confirmed by the Secretary of the Interior" are those where the Secretary is vested with exclusive and quasi-judicial jurisdiction to determine the character of the lands, as in the case of swamp lands, mineral lands, and so on. His confirmation is not required where the grant is a general one of public lands, like this canal grant.

Wright vs. Roseberry, 121 U. S., 490, and authorities, supra.

And the Secretary of the Interior did not in fact assume to confirm.

The words "Consideration received by the government" cannot apply to this business of the Canal Company with it. The canal, when completed, was not to be owned by the government any more than the railroads were under the railroad grant. Both were to be owned and conducted by private parties.

The first paragraph of Section 3, in so far as it refers to lands as State selections "confirmed by the Secretary of the Interior," covers the indemnity swamp land grants, Agricultural College scrip to the States and the like.

The swamp land grant for indemnity was to the States, authorizing them to enter at one dollar and a quarter per acre.

See R. S., Section 2482, p. 457.

The State of Michigan, in passing the joint resolution approved June 15, 1889, releasing the title in harmony with the Forfeiture Act of March 2, 1889, by a proviso saved everything under the swamp land grant, and of course under its amendments, and had the same thing in the legislative mind. (Laws of Michigan of 1889, No. 19, p. 440.)

Again, the last clause of Section 3, with great care excludes the construction that even it should confirm anyone's title to the exclusion of *bona fide* pre-emption or homestead cl ims.

But to make assurance again doubly sure that the Canal Company should take no benefit from any confirmatory clause, the first clause of Section 4 is inserted, as follows:

"That no lands declared forfeited to the United States "by this act shall inure to the benefit of any State *or* "*corporation* to which lands may have been granted by "Congress except as herein otherwise provided."

This points out the Canal Company and no one else, as it was a corpor tion to which lands were granted, and excludes *corporations*, who have received such grants, from the effect of the first clause of Section 3, exposing to that effect only individuals and firms, and only such corporations as had *not* received grants from Congress.

The corporations excepted in the first clause of Section 4 "as herein otherwise provided" are railroad corporations excepted by the first proviso of Section 1, and the first clause of Section 2.

Section 5 again protects persons who have settled upon any of the railroad land grants which are forfeited by the act.

The whole history of the improper selections of the Canal Company, the futile and unauthorized releases, the temporary error of the Land Department, and so on, were before the Congress which passed this act.

If the intention had been to confirm the Canal Company's selections upon this grant, the Congress could have said so in simple terms.

But the whole history of the efforts, by direct and indirect legislation on the part of the Canal Company to obtain confirmation, the gross improvidence of the grant, the company's treatment of the government and of the people, and finally the Forfeiture Act itself, leave this matter of construction exposed to the conclusion that the Congress intended by this act to except from the forfeiture the holdings of every honest purchaser, and of every honest settler, and every honest selection on the old railroad grant, but to give no more land to the Lake Superior Ship Canal, Railroad & Iron Company than the strict letter of the law would give it, as that law stood prior to the passage of the act in question.

I submit that the judgments in the cases of Cunningham and Finan should be affirmed, and that the Donohue judgment should be reversed.

DON M. DICKINSON,
For the Defendant Settlers.

FILED.
OCT 27 1894
JAMES H. McKENNEY,
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155-354

Supreme Court of the United States.

OCTOBER TERM, 1894.

LAKE SUPERIOR SHIP CANAL RAILWAY & IRON COMPANY, Plaintiff in Error, vs. WALTER CUNNINGHAM.	No. 49.
THE SAME vs. HUGH FINAN.	No. 50.
MICHAEL DONAHUE, Plaintiff in Error, vs. THE LAKE SUPERIOR SHIP CANAL RAILWAY & IRON COMPANY.	No. 51.

Supplemental Brief of Don M. Dickinson, for Cunningham, Finan and Donahue.

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SUPPLEMENTAL BRIEF FOR THE PRE-EMPTION SETTLERS.

Since printing and filing our original brief, the brief and argument of the learned counsel for the Canal Company and the pamphlet entitled "Proceedings and Debates in Congress Extracted from the Congressional Record" have been furnished us by the Clerk of this Court.

Nothing of the kind was presented below either in evidence or argument.

In the brief time at our disposal, we cannot follow the other side and produce the debates in the House, the reports of committees, or the entries in "The Journals" of the Senate and House, all of which seem to be omitted in the pamphlet; neither can we verify the matter that is presented, especially as to whether it covers all of the debates and proceedings which the pamphlet purports to give.

Certain it is that the "Debates" printed in the Congressional Record are no part of "The Journals" of Congress;

Certain it is that no "external evidence" whatever can be resorted to in the construction of statutes to arrive at the intention of the Legislature except there is an ambiguity on the face of the whole enactment taken together; which cannot be explained by all the other expressions of the act, by ordinary and settled canons of construction;

And certain it is that in no case, even where a doubt of the intention of the Legislature may be raised on scanning an enactment as a whole, can any such matter be used as is here presented to solve that doubt.

Non constat, some Senator out of eighty-eight in debate states his understanding of a clause or a bill. What shall be said of the eighty-seven who are silent but who vote for it, knowing that the speaking Senator is wrong and has ignored settled rules of construction, the accepted meaning of terms, and the whole accepted lexicon of legislative phrasing.

What was the intention of the members of the *other* House who silently voted for it?

If a Senator is wrong in his opinion as to the effect of a bill, construed properly, would it not be a presumption that the silent Senators, of a contrary intention, have been satisfied to vote for the bill with their own and the proper construction, and have consequently so voted without combatting the error in debate.

But the authoritive judgments of Courts are against the learned counsel in good set terms, and we proceed to a review of the authorities:

"The declaration of Senators on the discussion of these provisions are useful, not only as showing what the legislators understood they were doing, but they are also an official statement of the 'occasion and necessity of the law, the mischief felt, and the remedy in view.'" (Mr. Dillon's brief, p. 139.)

"The Court may also examine the order of the amendments to the act to see how it was built up and constructed, in order to get at the intention of Congress." (Mr. Dillon's brief, p. 131.)

"We may look to the declared object of the statutory provision as appearing in the congressional debates." (Mr. Dillon's brief, p. 137.)

In the discussion of the above propositions opposing counsel cite the following cases, and for the purpose of analysis, we classify them under these heads:

FIRST: Those cited in support of general rules of construction.

SECOND: Those cited in affirmance of the right to refer to legislative journals.

THIRD: Those cited in affirmance of the right to refer to legislative debates or proceedings not in the journal.

UNDER THE FIRST CLASS:

1. "The intention of the Legislature is the thing to be sought for." People vs. Utica Ins. Company, 15 Johnson, 353 (Mr. Dillon's Brief, page 128).

We give here a somewhat fuller extract from the case, showing the distinct limitations of courts in seeking the intention of the Legislature.

Opinion of the Court on one issue, delivered by Thompson, C. J.:

"The information filed in this case charges the defend-"ants with engaging in banking operations, without any "authority under the act incorporating them, and in vio-"lation of the prohibition in the act to restrain unincor-"porated banking associations. * * * * * * *

"*I do not, however, in construing the grant, mean to travel "out of the act itself.* But when a right is claimed under "it, so manifestly repugnant to the general scope and ob-"ject of the grant, we ought to keep this in view, when we "are looking for the intention of the Legislature. And if "all parts of the act, and all the terms made use of, can "be made to apply to the avowed objects of the incorpora-"tion, the sound rules of construction will so limit and "apply them. That in construing a statute, the intention "of the Legislature is a fit and proper subject of in-"quiry, is too well settled to admit of dispute. "*That intention, however, is to be collected from the act "itself, and other acts, in pari materia.* It may not, how-"ever, be amiss to state, and keep in view, some of the "established and well-settled rules on this subject.

"*Such construction ought to be put upon a statute as "may best answer the intention which the makers had in "view. And this intention is sometimes to be collected "from the cause or necessity or making the statute, and "sometimes from other circumstances; and whenever such "intention can be discovered, it ought to be followed with "reason and discretion, in the construction of the statute, "although such construction seem contrary to the letter of "the statute.* Where any words are obscure or doubtful,

"the intention of the Legislature is to be resorted to, in "order to find the meaning of the words."

Spencer, J., in his opinion, same case, on a different issue, says:

"I have totally disregarded all insinuations or sugges- "tions that the Legislature, in point of fact, did not intend "to grant banking powers. I know of no other rule by "which to construe a statute, than to examine it by the "words it contains, to give to its expressions a fair and just "interpretation, upon the established rules of construc- "tion. Courts of law cannot consider the motives which "may have influenced the Legislature, or their intentions, "any further than they are manifested by the statute it- "self."

II. "The Court looked to the petition for the act to see what was its object and intent."

Furman vs. New York, 5 Sanford, 16.

(Mr. Dillon's brief, p. 131.)

We give a fuller extract to show the necessity that must exist before the Court will go even thus far.

Mason, J., delivering the opinion of the Court, says: "The decision of this cause depends on the construction "to be given to the first and second sections of the act "concerning streets, wharves, and piers, in the City of "New York, passed April 3, 1798. * * * * * It "becomes material, then, to ascertain the meaning and "true construction of the act in question."

" 'The only rule,' said Lord Chief Justice Tindal, in the "case of the claim of the Dukedom of Sussex (8 Lond. Jur., "795), 'for the construction of acts of Parliament is, that

"'they should be construed according to the intent of the "'parliament which passed the act. *If the words of the "'statute are in themselves precise and unambiguous, then "'no more can be necessary than to expound the words in "'their natural and ordinary sense. The words them-"'selves, alone, do, in such case, best declare the intention "'of the law-giver.* But if any doubt arise from the terms "'employed by the Legislature, it has always been held as "'a safe means of collecting the intention, to call in aid "'the ground and cause of making the statute, and to have "'recourse to the preamble, which, according to Chief Jus-"'tice Dyer, is a key to open the minds of the makers of "'the act and the mischiefs which they intended to re-"'dress.'"

UNDER THE SECOND CLASS ARE:

I. "The Court may also examine the order of the amendments to the act to see how it was built up and constructed, in order to get at the intention of Congress."

Marshall vs. National Bank, 23 Wallace, 307, and cases infra.

(Mr. Dillon's Brief, page 131.)

The Court went no further in this case than the following words, taken from the opinion of Mr. Justice Hunt, state:

"From the examination of the Globe Congressional "Journal of the Forty-First Congress (page 5516) and of "the original Journal of the House of Representatives, we "learn that as originally reported and passing the House "the words 'for and during the year 1871,' now making a "part of the fifteenth section, were not in the bill; nor were there any corresponding words."

Davis, Strong and Bradley, J. J., dissented from the opinion.

We submit this language does not warrant the reference to debates which opposing counsel proceed to make on the strength of this case.

II. "Journals of Congress and State Legislatures are "*evidence*."

Watkins vs. Holman, 16 Peters, 56.

(Mr. Dillon's brief, p. 138.)

III. * * * "The Court may properly 'resort to the "journals of the two legislative bodies, to learn therefrom "the history of the law in question.'" * * *

Edger vs. Board of Commissioners, 70 Ind., 358.

(Mr. Dillon's brief, p. 141.)

IV. "In the case of Warner vs. Beers, in the Court of "Errors in the State of New York, 23 Wendell, 103, the "Court referred to the Journals of the Legislature and the "history of a law to aid in its construction."

"The President of the Senate (p. 179) quotes from the "language of the committee reporting the bill and refers "to the history of the act for the purpose of giving its "proper construction." (Mr. Dillon's brief, p. 140.)

For the purpose of weighing the importance of the rules laid down by this tribunal where they conflict with well-settled law, it is profitable to consider how the Court is constituted. But only one, the President of the Senate, who by the peculiarity of his position was a part of the legislative branch of the State Government, presumed to go further than the *examination of the journal*.

We therefore give a fuller extract of this case:

Case involving the constitutionality of a general banking act. Whether it was necessary for such a law to have a two-thirds majority of both Houses in being passed.

This was a case in the Court for the correction of errors; and opinions were delivered by

The President of the Senate,
The Chancellor,
Senator Root and
Senator Verplanck.

The question was not raised as to the right to examine journals and debates to find legislative intention.

By Senator Verplanck:

* * * * * "Although then, we, the Senators of this "State, have not, like our judical coleagues, the enviable "privilege of being consecrated to the priesthood of jus- "tice." * * * * "We too, for the time, are minister- "ing servants at the same altar."

* * * "Those especially of us who, two years ago, "bore a part in enacting or opposing the law now under "consideration, must strive to elevate ourselves to the im- "partial discharge of these weighty obligations. We must "endeavor to raise our minds above the pride of opinion, "as well as above the still more culpable weakness of aban- "doning our honest convictions of truth, from the dread of "the imputation of being influenced by obstinacy or self- "conceit, by personal interests or personal pride.

"From our official knowledge of the facts of the law— "from those facts being spread out on our journals—from "the actual inspection of the record by some of us, we all "well know that the act was *not* passed by the vote of two- "thirds of each House of the Legislature."

* * * * "It is a general principle of legislative in-"terpretation, that the declared or obvious intention of the "Legislature is always entitled to the highest respect in the "interpretation of their statutes. For the reasons above "stated, the external evidence of acknowledged facts in "the political history of our State, is good authority to "indicate that intent. The same intention may also be "shown from our journals, the very highest documentary "history, and to which I doubt not that Courts may refer "for the meaning or intention of acts."

UNDER THE THIRD CLASS:

I. Warner vs. Beers, 15 Johnson, N. Y., 379, *supra*, upon which we make no further comment.

II. Taking a clause out of the opinion of Justice Strong in the case of Platt vs. Union Pacific R. R. Co., 99 U. S., 48, Mr. Dillon draws the following conclusion therefrom (Dillon Brief, p. 140):

"For this purpose it seems to us clear that the reports "of committees, reports of public officers to Congress, or "laid before Congress, as well as the statements of mem-"bers of Congress themselves, as to the state of things "then existing, and the evils to be remedied, are the most "reliable authority or data, and should be so considered by "the Court."

We cannot agree with opposing counsel in the conclusion drawn from this case, and we maintain that the fuller extract from the case, as follows, shows that the language is not intended to have the effect stated.

Question of construction of act of Congress of July 1, 1862, wherein the United States granted lands to the Union Pacific Co.

Whether the Railroad Company had right to mortgage the land granted to it?

Opinion by Mr. Justice Strong. Bradley, Clifford and Miller, JJ., dissenting.

* * * "*All will concede that in construing the act of* "*1862 we are to look at the state of things then existing,* "AND IN THE LIGHT THEN APPEARING *seek for the purposes* "*and objects of Congress in using the language it did.* "*And we are to give such construction to that language, if* "*possible, as will carry out the congressional intentions.* "For what particular purpose, then, was the grant of "lands made? The statute itself answers, 'for the pur- "'pose of aiding in the construction of the railroad and "'telegraph line,' and securing governmental transporta- "tion, &c. The lands were granted to be used in further- "ance of such construction. But Congress and the gran- "tees must have known that, when granted, the lands were "of little worth. They were then unsalable at any price. "Their value was wholly prospective, dependent upon the "construction of the road. Purchasers could not have "been reasonably expected, certainly few, for immediate "settlement. The obvious mode, therefore, of using the "lands for the construction of the road (not for paying "debts incurred in the construction, but for immediate "need as the construction was progressing) was to hypothe- "cate them as security for a loan."

* * * "Congress must have been blind, indeed, if "it did not forsee this, and intend to authorize the use of "the lands to raise money by mortgage for the object it "had so much at heart. * * * * *

* * * "But in endeavoring to ascertain what the "Congress of 1862 intended, we must, as far as possible,

"place ourselves in the light that Congress enjoyed, look "at things as they appeared to it, and discover its pur- "pose from the language used in connection with the at- "tending circumstances. Guided by this rule of construc- "tion, as well as by others universally recognized, we have "been led unhesitatingly to the conclusion that the deed "of trust or mortgage executed by this company in 1867 "was a disposition of the lands granted by the third sec- "tion of the act of 1862, within the meaning of that act."

Mr. Dillon quotes only that italicized above, and it will be seen that with the fuller context given above this language will hardly warant the deduction put upon it by Mr. Dillon.

Although the question was raised of the power of the Court to go beyond the law to find the intention of the Legislature, it confined itself to *undisputed public history* and *prior legislation*, which was the *limitation* of the language it used as quoted by Mr. Dillon.

III. Nor can the words of Mr. Justice Field in the case of Ah Kow vs. Nunan, 5 Sawyer, 552-560, as cited by opposing counsel (Mr. Dillon's brief, p. 141), supporting the above conclusion, be accorded the weight sought to be given them in this connection, when read with the facts of the case, which are here given in greater detail.

Opinion by Mr. Justice Field.

A California law provided for the punishment by fine and imprisonment of any person found sleeping in a room containing less than 500 cubic feet of space for each person.

An ordinance was passed by the Supervisors of San Francisco providing that every male prisoner confined in county jail under judgment of criminal court, shall have his hair cut off to a uniform length of one inch.

The plaintiff, a Chinaman, having had his queue cut off by the Sheriff, sued for damages.

The Sheriff justifies under the ordinance, but plaintiff contends it is not valid. Mr. Justice Field says:

"In the present case, the plaintiff was not convicted of "any breach of municipal regulation, nor of violating any "provision of the consolidation act. The punishment "which the Supervisors undertook to add to the fine im- "posed by the Court was without semblance of authority. "The Legislature had not conferred upon them the right "to change or add to the punishments which it deemed "sufficient for offenses; nor had it bestowed upon them "the right to impose in any case a punishment of the "character inflicted in this case. They could no more "direct that the queue of the plaintiff should be cut off "than that the punishments mentioned should be in- "flicted. Nor could they order the hair of any one, Mon- "golian or other person, to be clipped within an inch of "his scalp. That measure was beyond their power."

"The second objection to the ordinance in question is "equally conclusive. It is special legislation on the part "of the Supervisors against a class of persons who, under "the Constitution and laws of the United States, are en- "titled to the equal protection of the laws. The ordinance "was intended only for the Chinese in San Francisco. "This was avowed by the Supervisors on its passage, and "was so understood by everyone. The ordinance is known "in the community as the 'queue ordinance,' being so "designated from its purpose to reach the queues of the "Chinese, and it is not enforced against any other per- "sons. The reason advanced for its adoption, and now "urged for its continuance, is that only the dread of the "loss of his queue will induce a Chinaman to pay his "fine. That is to say, in order to enforce the payment of "a fine imposed upon him, it is necessary that torture

"should be superadded to imprisonment. Then, it is said, "the Chinaman will not accept the alternative, which the "law allows, of working out his fine by his imprisonment, "and the State or county will be saved the expense of "keeping him during the imprisonment. Probably the "bastinado, or the knout, or the thumbscrew, or the rack, "would accomplish the same end; and no doubt the "Chinaman would prefer either of these modes of torture "to that which entails upon him disgrace among his "countrymen, and carries with it the constant dread of "misfortune and suffering after death. It is not credit- "able to the humanity and civilization of our people, much "less to their Christianity, that an ordinance of this char- "acter was possible.

"The class character of this legislation is none the less "manifest because of the general terms in which it is "expressed. The statements of Supervisors in debate on "the passage of the ordinance cannot, it is true, be re- "sorted to for the purpose of explaining the meaning of "the terms used; but they can be resorted to for the pur- "pose of ascertaining the general object of the legislation "proposed, and the mischiefs sought to be remedied. Be- "sides, we cannot shut our eyes to matters of public "notoriety and general cognizance. When we take our "seats on the bench we are not struck with blindness, "and forbidden to know as judges what we see as men; "and where an ordinance, though general in its terms, "only operates upon a special race, sect or class, it being "universally understood that it is to be enforced only "against that race, sect or class, we may justly conclude "that it was the intention of the body adopting it that "it should only have such operation, and treat it accord- "ingly. We may take notice of the limitation given to "the general terms of an ordinance by its practical con-

"struction as a fact in its history, as we do in some cases "that a law has practically become obsolete."

The interpretation of this ordinance did not depend, as we see by the above language, upon the intention of its makers as expressed in debate on its passage, and it can hardly be contended that the learned justice meant the language quoted in Mr. Dillon's brief to overrule his decision on the admissibility of debates in Congress to aid interpretation, as expressed in

Leese vs. Clark, 20 Cal., p. 388, infra.

IV. "In the case of Green vs. Graves, I. Doug. (Mich.), "351 (see p. 365), the Court refers to the Journal of the Con- "stitutional Convention and the opinions *expressed on the "subject of the clause* under consideration, in order to aid in "the proper construction of that clause, and the Court "uses the following language:

"'Who that is familiar with the opinions of the Conven- "'tion, or has consulted the Journal of its proceedings "'upon the subject of corporations, can hesitate as to the "'true construction of the clause relating to this subject?'" (Mr. Dillon's Brief, 138.)

We submit that this language of opposing counsel and the quotation is not at all warranted by the case and context. The Court nowhere in the opinion refers to "*opinions "expressed*" on any clause. A good deal of light is thrown on this matter by reading the sentences which immediately follow the above extract, viz.:

"These opinions were hostile to the multiplication of "corporations. *Not only is this manifest from the clause "itself, which requires a vote of two-thirds of each house*

"to pass an act of incorporation, but the journal shows "that that clause was unanimously adopted."

The learned Court went properly to the Journals of the Convention and the public history of the time, and not to "opinions expressed" by the individuals of the Convention. The Michigan Courts have never attempted to go beyond the Journals of the two Houses.

See Hart vs. McElroy, 72 Mich., 416. *infra.*

V. In the case of United States vs. Souders, 2 Abbott, p. 456 (Mr. Dillon's Brief, 139), it will be seen that Nixon, United States District Judge for New Jersey, on his own motion, went into the records and debates of Congress, just as the Court is now asked to do by opposing counsel, but the question of the right to do so was not raised.

VI. "In the case of Harrison vs. Hadley, 2 Dillon, 229, "the Court, Caldwell, Justice" (U. S. Dist. Judge, E. D. Ark.) "referred at considerable length to the history of the "enforcement act, the proceedings in Congress on its pas- "sage, and the language of reports of committees upon it, "for the purpose of throwing light upon the proper con- "struction of the act." (Mr. Dillon's Brief, p. 139.)

One of the strongest illustrations of the danger of the rule opposing counsel contends for is given in this case, in the following words from the opinion of the learned Judge:

"In support of the jurisdiction, one of the counsel for "complainant, in the argument, read from speeches made "by senators in Congress while the enforcement act was

"pending before that body. An examination of the official "report of the proceedings of Congress discloses the fact "that the particular section of the bill to which those "speeches related was afterwards stricken out and is not "now found in the act."

Opposing counsel admits that "the *opinion* of *indi-* "*vidual* legislators, expressed in debates upon the bill as "to the *meaning* of *words* or *provisions*, are entitled to "but little weight" (Mr. Dillon's Brief, p. 137); but main- "tained that:

"We may look to the *declared object* of the *statutory* "*provision* as appearing in the congressional debates." "(Mr. Dillon's Brief, p. 137.) And further:

"The declarations of senators on the discussion of these "provisions are useful, not *only* as *showing* what the *legis-* "*lators understood they were doing*, but they are also an "official statement of the 'occasion and necessity of the " 'law, the mischief felt, and the remedy in view.' "

(Mr. Dillon's Brief, p. 139.)

We have discussed the cases cited by opposing counsel, and we now take up the three classes of cases, as above stated, in their reverse order; and we maintain:

THIRD.

Debates cannot be considered in construing statutes.

I. Aldrich vs. Williams, 3 Howard, pp. 1-24. Taney, C. J., in delivering the opinion of the Court, says:

"The great question intended to be tried is, whether, "under the Act of Congress of March 2, 1833, the govern-

"ment was authorized to collect any duties upon goods "imported after the 30th of June, 1842, without the aid "of further legislation by Congress? * * * * * * * "In expounding this law, the judgment of the Court can- "not, in any degree, be influenced by the construction "placed upon it by individual members of Congress in "the debate which took place on its passage, nor by the "motives or reasons assigned by them for supporting or "opposing amendments that were offered. The law as it "passed is the will of the majority of both Houses, and "the only mode in which that will is spoken is in the act "itself; and we must gather their intention from the lan- "guage there used, comparing it, when any ambiguity "exists, with the laws upon the same subject, and looking, "if necessary, to the public history of the times in which "it was passed."

The issue was squarely before the Court; raised by Johnson, attorney for plaintiffs in error, page 23, as follows:

"The 5th section was not in the bill when originally "reported. Why was it put in? See Mr. Clay's speech, "Reg. Deb., vol. 9, part 1, p. 463. The original bill pro- "vided, that after 1842 the duty should be 20 per cent., "but this was stricken out, and a clause inserted, that "Congress should provide, etc. * * * * * "as to "'regulations to be prescribed by law.' The debates "show, that a proposition was distinctly made, by Mr. "Dickinson, to leave them to the executive, and rejected, "because it was doubted whether it was a power appro- "priate to the executive." * * * * *

Nelson, Attorney-General, takes issue on the proposition as follows:

"But it has been said that the statute in question may "be explained by extrinsic parol evidence of the meaning "of the Legislature which passed it. Now, I hold, 1st,

"that you cannot look in interpreting an act, beyond the "terms of the act itself, and the particular historical cir- "circumstances out of which it grew, and 2nd, that if you "can, the evidence which has been invoked proves noth- "ing."

"As to the first proposition see

"Dwarris on Statutes, 48.
"People vs. Utica Ins. Co., 15 Johns., 380, 395" (cited in Mr. Dillon's brief).
"Wilkinson vs. Leland, 2 Peters, 662.
"1 Kent Com., 461.
"Opinions of Attorney-General, Mr. Wirt's opin- "ion, pp. 444, 445."

II. United States vs. Union Pacific R. R. Co., 91 U. S., 72-79. Mr. Justice Davis delivered the opinion of the Court.

"In construing an Act of Congress, we are not at lib- "erty to recur to the views of individual members in de- "bate, nor to consider the motives which influenced them "to vote for or against its passage. The act itself speaks "the will of Congress, and this is to be ascertained from "the language used. But courts, in construing a statute, "may with propriety recur to the history of the times "when it was passed; and this is frequently necessary, "in order to ascertain the reason as well as the meaning "of particular provisions in it."

Citing

Aldridge vs. Williams, 3 How., 24.
Preston vs. Browder, 1 Wheat., 120.

The "history of the times" is entered into fully, but it does not embrace debates in Congress.

III. Soon Hing vs. Crowley, 113 U. S., 703-710, Mr. Justice Field, delivering the opinion of the Court on the construction of a municipal ordinance regulating the conducting of laundries and wash-houses, says:

"The principal objection, however, of the petitioner to "the ordinance in question is founded upon the supposed "hostile motives of the supervisors in passing it. The pe- "tition alleges that it was adopted owing to a feeling of "antipathy and hatred prevailing in the city and county "of San Francisco against the subjects of the Emperor of "China resident therein, and for the purpose of compelling "those engaged in the laundry business to abandon their "lawful vocation, and residence there, and not for any "sanitary, police or other legitimate purpose. There is "nothing, however, in the language of the ordinance, or in "the record of its enactment, which in any respect tends "to sustain this allegation. *And the rule is general with "reference to the enactments of all legislative bodies that "the courts cannot inquire into the motives of legislators "in passing them, except as they may be disclosed on the "face of the acts, or inferable from their operation, con- "sidered with reference to the condition of the country "and existing legislation.*"

"The motives of the legislators, considered as the pur- "poses they had in view, will always be presumed to be to "accomplish that which follows as the natural and reason- "able effect of their enactments. Their motives, consid- "ered as the moral inducements for their votes, will vary "with the different members of the legislative body. The "diverse character of such motives, and the impossibility "of penetrating into the hearts of men and ascertaining "the truth, precludes all such inquiries as impracticable "and futile. And in the present case, even if the motives "of the supervisors were as alleged, the ordinance would "not be thereby changed from a legitimate police regula-

"tion, unless in its enforcement it is made to operate only "against the class mentioned; and of this there is no pre- "tence."

IV. Maynard vs. Hill, 125 U. S., pp. 190-209. Mr. Justice Field, delivering the opinion of the Court on a charge that the motives of the Territorial Legislature in granting a divorce, were improper, says:

"We cannot inquire into its motives in passing the act "granting the divorce."

V. Forrest vs. Forrest, 10 Barbour, S. C. R., 46-55. Before Edmonds, Edwards and Mitchell, Justices.

Edmonds, P. J., delivered the opinion—on question whether writ of *ne exeat* was abolished by the N. Y. code.

The Court says:

"It would doubtless tend to relieve our task of inter- "preting the code, of much of its burden, if we could be "at liberty to refer in all instances to the views of the "commissioners in reporting it; and though that might "involve in all cases, the inquiry whether the part under "consideration had been reported by them *or interpolated* "*by the legislature*, and might sometimes require us to give "a construction quite foreign to the plain import of the "language used, yet it would materially lesson both the "responsibility and the labor which seem to be accumulat- "ing upon us. But I know of no principle to authorize us "to adopt such a course. The maxim *a verbis legis, non est* "*recedendum* (5 Coke, 119) is as old as the common law it- "self, and nothing is better settled than the rule that the "intention of the lawgiver is to be deduced from a view of "the whole and every part of a statute taken and compared "together, and that the true meaning of a statute is prop-

"erly to be sought from the body of the act itself. The "current of authority is in favor of reading statutes ac- "cording to the natural and obvious import of the lan- "guage (per Bronson, J., 20 Wend., 561), and where the "words are not explicit, the intention of a statute is to "be gathered as well from its context as from the occasion "and necessity of the law, from the mischief felt, and the "objects and remedy in view. (1 Kent's Com., 462.) Such "I understand to be the sound maxims of interpretation "established by the experience, and ratified by the appro- "bation of ages, and I have neither the power nor the in- "clination to wander from them in pursuit of the presumed "intention of the propounders of the statute."

It will be noticed that although the Court here uses the words "from the occasion and necessity of the law, from "the mischief felt, and the objects and remedy in view" (adopted practically by Mr. Dillon in his brief), it expressly held that these did not include the right to seek for information to these ends in debates, or from the manner of the building up of the statute.

VI. Belleville, etc., R. R. Co. vs. Gregory, 15 Ill., 20-30. Caton, J., delivered the opinion of the Court.

Question of construction of act authorizing the construction of a railroad.

The Court says:

(Page 25.) "But we were referred to legislative history, "to show that this power of extension was not designed to "confer so broad a right as the language imports." * * * * * * * "Nor can the presumed, or even well-known "views of all the members of the Legislature, be allowed "to repeal an express provision of a law, or to control its "construction. The law alone can speak the legislative will.

"When the Courts shall be driven to the lobbies of the "Legislature to learn the sentiments of the members, for "the purpose of construing the laws, a new rule of con- "struction will have been adopted."

VII. Keyport Steamboat Company vs. Farmers' Transportation Company, 18 N. J. Eq., pp. 13-26. Opinion by Zabriskie, Chancellor.

Question as to construction of an act to incorporate a Dry Dock Company.

"The intention of the draftsman of an act, or the indi- "vidual members of the Legislature who voted for and "passed it, if not properly expressed in the act, it is ad- "mitted, has nothing to do with its construction; the only "just rule of construction, especially among a free people, "is the meaning of the law as expressed to those to whom "it is *prescribed*, and who are to be governed by it. *If the "legislator who enacted the law should afterwards be the "judge who expounds it, his own intention, which he had "not skill to express, ought not to govern.* But circum- "stances known to all the public, such as what the law was "at the time, or what it was supposed to be, are proper to be "considered in looking for the intention of the Legislature "when not explicitly expressed."

VIII. County of Cumberland vs. Boyd et al., 113 Pa. St., 52-57. Opinion per Curiam. Mercur, C. J., Gordon, Paxson, Sterrett, Green and Clark, JJ.

It was contended that "An act to define and punish tramps" of 1879, repealed an "Act to suppress vagrancy." Held, that the latter act did not repeal the former.

Edward B. Watts, for plaintiff in error, contended:

"If the intention of the Legislature be sought, it will

"appear that it meant to repeal the old law. Senator Wol-
"verton, on page 1246 of Legislative Record of 1879, part
"2, says, in discussing the tramp law then under considera-
"tion. 'If for no other purpose, I would vote for this bill;
"'it has a repealing clause in the sixth section which re-
"'peals this iniquitous stone pounding act' (referring to
"the act of 1876). Senator Hall, on page 1249: 'We repeal
"'the Act of 1876, whether we pass the Act with the
"'amendment of the Senator from Chester or whether we
"'pass it without. In either case we repeal the Act of
"'1876.'"

On the question of what may be considered by the Court in construing a statute, the Court says:

"Per Curiam. There is no error in this record to give
"the plaintiff just cause of complaint. In giving construc-
"tion to a statute we cannot be controlled by the views
"expressed by a few members of the Legislature who ex-
"pressed verbal opinions on its passage. Those opinions
"may or may not have been entertained by the more than
"a hundred members who gave no such expression. The
"declaration of some and the assumed acquiescence of
"others therein, cannot be adopted as a true interpretation
"of the statute. Keeping in mind the previous law, the
"'supposed evil and the remedy desired, we must consider
"the language of the statute, and the fair and reasonable
"import thereof. Thus examining the Act of 1879 we do
"not think it repealed the Act of 1876."

IX. Leese vs. Clark, 20 Cal., pp. 388-426. We quote more fully from this one case because in it there was an attempt to show by the extended debates just how, in the language of Judge Dillon "the statute was built up."

Field, C. J., delivered the opinion of the Court, Cope, J., concurring.

This was a suit in ejectment to settle title in land in San Francisco.

"The plaintiff relied for recovery of the premises "* * * upon a patent of the United States * * * "pursuant to the Act of Congress of March 3, 1851."

* * * "The main proposition of (opposing) counsel "is, that the patent of the United States is only a re- "lease—a quit-claim—a mere relinquishment on the part "of the government, binding none except the United "States and the claimants. If this can be sustained, the "other question becomes immaterial."

Counsel, in support of his proposition, contended as follows: (Page 405.)

"The patent of the United States is a mere "quit-claim "of the government.

"The precise effect which it was the intention of Con- "gress to give to such patents, can best be ascertained "from an examination of the debates in the Senate of the "United States when that provision was considered.

"The following extracts will be found in the twenty- "third volume of the Congressional Globe, on the pages "referred to. On page 157, Senator Gwin wished the act "of 1824 extended to California, with the exception of "that provision which required the claimants to make "adverse claimants parties."

* * * "On page 365, Senator Walker offered an "amendment: 'That in every case where a patent shall "'be issued, the patent shall operate only as a relinquish- "'ment of the title of the United States to the land pat- "'ented.'"

* * * "On page 371, Senator Ewing said: 'I see "'no objection to the amendment; it seems to be carrying "'out the effect of the bill.'

"Same page, Senator Badger thought 'it was unneces- "'sary for the reason that when the United States re-

"'ceived no consideration for the conveyance, it can have "'no operation but to guaranty the validity of the patent. "'From the nature of the case, it must be a mere release "'or quit-claim.' He thought the form of the patent, "showing for what it is issued, would show that it was a "mere release." * * *

* * * "On page 373 vote was taken on said amend- "ment and rejected; twenty-one for, twenty-four against, "on the express ground that it was not necessary.

"On page 428, Senator Walker proposed this amend- "ment: After the word State, to insert 'or any patent "'to be issued.' Without this, Mr. Walker doubted "whether the courts would adopt the idea that the patent "was to be nothing more than a relinquishment of title.

"As the provision stood, it was limited to the decrees "of the Commissioners, District and Supreme Courts.

"This amendment elicited general approbation, as ex- "pressing more clearly the sentiments of the Senate, and "extending the provision to a patent."

* * * * * * * * *

"On page 429, Senator Davis, expressing himself strong- "ly in favor of the amendment, says: 'If I understand "'the matter, we are all agreed that the United States do "'not mean to do more than to release what right they "'may have to the patentee.'

"Senator Berrien opposed the amendment.

"The amendment was then adopted—ayes, twenty; noes, "twelve.

"The foregoing extracts present in the clearest possible "manner, not only the effect, but the absolute limitation "which Congress intended those patents should possess.

"From this it results, that, in the language of Senator "Badger, a patent so issued, 'from the nature of the case, "'must be a mere release or quit-claim.'"

But Justice Field, notwithstanding, held:

"But the patent is not merely a deed of the United "States; it is a record of the government; of its action and "judgment with respect to the title of the patentees exist- "ing at the date of the cession."

And commenting on this method of ascertaining the intention of Legislators, he says:

"The respondents cite as authority for their position "the opinions expressed by certain members of the Senate "of the United States, when the Act of March 3rd, 1851, "was under discussion before that body. These opinions, "say the learned counsel, show, 'not only the effect, but "'the absolute limitation which Congress intended' the "patent should possess. We do not think so; on the con- "trary, they only express the views entertained by indi- "vidual members of one body of the national Legislature. "*Other Senators, who did not participate in the discus-* "*sion of the subject, may have held different views as to* "*the effect and operation of the patent; a majority of the* "*Senate even may have held different views; and the gen-* "*eral opinion of members of the House of Representa-* "*tives may have differed entirely from that of Senators,* "*both of those who spoke and of those who simply voted* "*on the subject.* It is evident that the opinions expressed "by individual legislators upon the object and effect of "particular provisions of an act under discussion, are en- "titled to very little weight in the construction of the act. "*The intention of the legislature must be sought in the* "*language of the act*—and the object *expressed or appar-* "*ent on its face—and not by the uncertain light of a leg-* "*islative discussion.* (See note to section 407 of Story on "the Constitution.)"

It does not seem as though there could be a stronger

case or a case more analogous to ours than this.

Here they went into the very question Mr. Dillon contends for, the right to show how the amendment to be construed came to be made—what scope the Senator who proposed the amendment intended it to have, is clearly set forth in the debate.

Notwithstanding this, the Court gave it a construction contrary to that contended for, and ignored the debate.

X. McGarrahan vs. Maxwell, 28 Cal., 75-94. Rhodes, J., delivering the opinion.

The doctrine laid down in Leese vs. Clark, 20 Cal., 388, is distinctly affirmed.

"We have not felt warranted in resorting to the *reports* "or *debates* in Congress, upon the passage of the Act of "1862, to ascertain its true meaning and construction, and "we adopt the language of Mr. Chief Justice Taney, in "Aldridge vs. Williams, 3 How., 24, as clearly expressing "the law in this respect. He says: 'In expounding this "'law, the judgment of the Court cannot, in any degree, be "'influenced by the construction placed upon it by indi-"'vidual members of Congress in the debate which took "'place on its passage, nor by the motives or reasons as-"'signed by them for supporting or opposing amendments "'that were offered. The law, as it passed, is the will of "'the majority of both Houses, and the only mode in which "'that will is spoken is in the Act itself, and we must "'gather their intention from the language there used, "'comparing it, when any ambiguity exists, with the laws "'upon the same subject, and looking, if necessary, to the "'public history of the time in which it was passed.'

"(Leese vs. Clark, 20 Cal., 425; Forrest vs. Forrest, 10 "Barb., 46.) The language of the Act is sufficiently plain "and unambiguous to indicate the intention of Congress,

"and upon reading it by the aid of the ordinary rules for "the construction of sentences, it is apparent that the Act "speaks of two different classes of lands and makes differ- "ent provisions respecting each class, as we have indi- "cated."

XI. District of Columbia vs. The Washington Market Company, 3 MacArthur, pp. 559-571, Hagner, J., delivering the opinion of the court, said:

"It has been insisted in the argument that the court, "with a view to a clearer understanding of the language "used in the section, is at liberty to consult the record of "the debates in the Houses of Congress while this section "was under discussion. It is true that the courts, in the "examination of certain constitutional questions, have at "times referred to the essays in 'The Federalist,' written "by the great founders of the instrument, contemporane- "ously with its submission to the people, and have cited "the opinions of those eminent men in support of their "conclusions. It is also true that in New York and in "some other States it has been considered proper to ex- "amine the journals of the Legislature to ascertain "whether a particular measure received the two-thirds "vote required by the State Constitution for that class of "laws. But we have seen no authority that would justify "us in appealing to so uncertain a source for guidance as "the remarks of members in debate."

XII. Kountze vs. City of Omaha, 5 Dill., 443. Dillon, Circuit Judge, says:

"It is inadmissible to institute a judicial inquiry into "the intention or motives of legislators in the enactment

"of a statute, and to make the validity of the enactment "depends upon the result of such an examination."

And to the same point see:

Taylor vs. Taylor, 10 Minn. 107.
Pagand vs. State, 5, S. & M. (Miss.) 497.
Barnes vs. Mobile, 19 Ala. 707.
Richmond vs. Henries Co., 83 Va. 212.
People vs. Shepard, 36 N. Y. 289.
Farmers' Loan & Trust Co. vs. Chicago P. & S. Ry. Co., 39 Fed. Rep. 143.

SECOND.

The journal of each branch of a legislative body may be used to aid in construing a statute.

But *only* when the legislative intent *cannot* be ascertained from the "face of the act" to be construed, and, as we have stated at the outset, there is ambiguity.

Soon Hing vs. Crowley, 113, U. S., 703, supra.
People vs. Utica Ins. Co., 15 Johnsons (N. Y.), 379, supra.
Furman vs. New York, 5 Sanford, 16, supra.
Forrest vs. Forrest, 10 Barbour, 46, supra.
And other cases cited, supra.

FIRST.

In the construction of statutes the legislative intent is to be followed, but the well-defined rules and limitations to be observed in ascertaining that intent, as seen in the authorities cited, throw out of the case the learned counsel's volume of debates.

DON M. DICKINSON,
For the Defendant Settlers.